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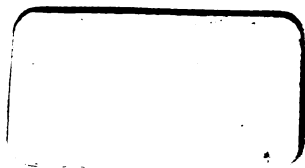
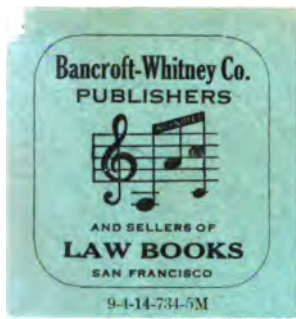
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RAILROAD RATE REGULATION

WITH SPECIAL REFERENCE TO THE POWERS OF THE
INTERSTATE COMMERCE COMMISSION
UNDER THE ACTS TO REGULATE COMMERCE

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NOW IN CONSULTING PRACTICE AT THE MASSACHUSETTS BAR

SECOND EDITION

BY
BRUCE WYMAN

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PREFACE TO THE SECOND EDITION

The historical development of the general principles of rate regulation receive such attention throughout the course of this book from the very beginning that there would seem to be no reason for undertaking any summary of them in this place. But in preface to a Second Edition one cannot fail to remark the extraordinary growth in the subject he is treating in the few years which have passed since the First Edition was written. The occasion for the writing of this book originally was the belief that by the passing of the Hepburn Act of 1906 the Interstate Commerce Commission was to have a power in shaping the destinies of the commerce of the country beyond anything which would have been possible under the Act to Regulate Commerce of 1887. In writing the First Edition we had only the rulings of the original Commission to guide us and the few decisions of the Courts, mostly to the effect that the Act did not justify what was ordered. In this Second Edition we have the many volumes of the Commission making orders as to future conduct, which are supported in most instances by the decisions of the Courts. This Second Edition, covering the past eight years of the activities of the Commission, has several hundred per cent more opinions as the basis for its text than the First Edition, covering the first twenty years.

The story of the rise of the Commission by successive amendments to the Act is told so fully in the early chapters of this Edition that it need not be anticipated here. To one who has had anything to do with directing in consultation as counsel the policies to be pursued in answering complaints filed before the Commission, the necessity seems apparent of being conversant with the dates of the additions to the powers of the Commission in order to be

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able to know what rulings of a former time are no longer of current authority under the Act as it now reads. And it may be pointed out that, in addition to the progress in the extension of the jurisdiction of the Commission by changes in the Act by Congress, there may be seen, by one who is accustomed to look for development in the law by the course of the decisions of those administering it, a continual revelation of the expansion of the scope of the obligations to the public of the carriers conducting transportation subject to the Act. And from all this one can attempt with some confidence to prophesy as to the likelihood of further advance in the authority of the Commission, as a lawyer in practice must inevitably be able to do with respect to every new case brought to his attention.

In the First Edition of this book fully a third of the text was devoted to an exposition of the fundamental obligations of public employment in general and common carriers in particular. At that time there was no general discussion of public employment and its necessary incidents in any book; but even in the few years which have intervened the general principles of the peculiar law of public calling have become well understood. In 1911 in writing his general treatise on Public Service Companies, the present author made use of this material, note being made in the preface that this matter would be omitted from the Second Edition of the Railroad Rate Regulation when the time came. While in the nature of things there is thus a certain amount of generalization concerning rates which the author has come to regard as fundamental in much the same language in both of these works, this is the only matter which the Second Edition of this book, now devoted exclusively to Railroad Rate Regulation, has in common with the current edition of the Public Service Companies, in which the charging of proper rates is treated along with the many other obligations of public employment. It may also be remarked that the Public Service Companies is based entirely on

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the cases decided in the Courts with hardly a reference to the rulings of the Commissions, while the Railroad Rate Regulation in its present form is based almost entirely upon the decisions of the Commission under the Act, only those decisions of the Courts upon appeal therefrom being included, unless some point requires particular discussion.

It may be noted further in explaining the structure of this Second Edition that in the First Edition there was after Book I on the general law of common carriers, Book II with a general discussion of Rates and Discrimination from the court decisions, and finally Book III, having a particular commentary on the Act itself based upon the rulings of the Commission then in existence. This involved not necessarily a duplication of the discussion, but a separation of parts naturally complementary. The basis upon which this new Edition is worked out is, therefore, the consolidation of these separated chapters and the rewriting of them in the light of the mass of cases decided since. Thus the subjects of Rates and Discriminations are brought together under a single analysis of the several elements of the problems therein involved, and it is all remoulded in accordance with the lines indicated by the progress of the administration of the law since the original chapters were written. It should be said, however, that certain chapters stand without structural change as the foundation of the present treatment; this is especially noteworthy in the case of the chapters on Classification of Goods, Discrimination between Localities, Schedules of Rates, and Investigations of the Commission. In each of these chapters fully four times as many cases are cited in the footnotes as in the original chapters; and these long chapters, so fundamental in any book dealing with the principles governing Railroad Rate Regulation deal with matters to which only a few pages are devoted in the general treatment of Public Service Companies.

Moreover, there are many topics peculiar to the subject of the regulation of rates by the Commission under the Act,

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necessarily disposed of far too briefly in the First Edition, which can now receive the fullest possible consideration. Thus two considerable chapters in the first book of this Second Edition are devoted to treating of the scope of the jurisdiction of the Federal Government over the regulation of charges for interstate transportation and the extent of the jurisdiction conferred upon the Interstate Commerce Commission over common carriage and other transportation services. When the First Edition was written in 1906 the Commission had just been given power to fix rates for the future, and the power to suspend advances in rates was not granted until 1910; likewise its power to order joint rates, not granted until 1906, was not perfected until 1910. All of the treatment upon the Functions of the Commission in establishing Rates and the Jurisdiction of the Commission over Joint Rates which extends over several chapters in the Second Edition is, therefore, new matter written upon the basis of important decisions, all of which have been decided since the First Edition. The headings throughout are made so specific that the practitioner can easily seize upon the subject which is of interest to him for the time being in the matter he is examining. And after thus placing the business with which he is dealing, the lawyer working up a case will find under the appropriate heading in the Table of Contents the provisions of the Act summarized in the first section of each chapter followed by a statement of the scope of the powers of the Commission.

Attention may be called to the way in which the contrast is brought out between opposing theories of rate regulation where the conflict in the law is as yet not determined. Thus the policies of basing schedules as a whole upon the original Cost of the plant or upon its present Value are elaborately discussed together, with an indication of the collateral effects of a decision one way or the other. Likewise, whether in dealing with particular rates the Cost of the service or its Value is to be taken as the test, receives treatment to the extent of a chapter upon each. The author does not hesitate

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to let his own preference for cost as the basis of regulation appear, although he appreciates the modifications to which this theory must be subjected when put into practice. But at the same time in putting this book at the service of the profession at large, he has felt that care should be taken to set forth fully all that could be said for value as the basis of regulation, subject to such limitations as must necessarily be recognized. All of these four chapters on Rates in Particular and the Basis of Rate Structure are so largely rewritten as to be practically new matter.

As in the First Edition unusual space is devoted to the details of practice. Practically every case involving a point of practice of importance before the Commission has been treated in the text of the long chapter devoted to Procedure before that tribunal. And in regard to subsequent Proceedings before the Courts every case in which the action of the Commission has been brought in question in the Courts has been cited in this final chapter. Moreover, in the Appendix there are not merely the statutory provisions, but the Rules of Practice, and along with these Forms of Pleadings, both before the Commission and the Courts, which have stood the test of litigation. To make room for all this detailed matter the extracts from the statutes relating to the State Commissions, which were in the First Edition have been omitted. Indeed, in his work as counsel for the National Civic Federation in 1913 the writer found that the statutory matter collected on this point alone was sufficient to fill a large volume of its publications, such has been the growth of the Commission Control of Public Utilities in the past few years.

There remains the pleasant opportunity afforded by the preface to a Second Edition to express the gratitude of the author to the profession at large for the reception which has been accorded to the First Edition. Seldom has a law book been reviewed at such length in periodicals of standing, and aside from the gratification which an author naturally feels from such consideration, he hopes

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that he will be found to have profited from justified criticisms upon certain details. It rather belongs to the publisher than to the author to point out in advertisement of this Edition that this book has at times been quoted and discussed in rulings of Commissions and opinions of Courts and in briefs and arguments. The author trusts he appreciates the obligations which this recognition of the book lays upon him in the making of a Second Edition with the rewriting it has involved.

To many of his former colleagues upon the faculty of the Harvard Law School with whom the author has talked over most of these questions and particularly to Professor Joseph H. Beale, who was his senior partner in the writing of the First Edition, the author first of all acknowledges his indebtedness. But not less does he appreciate the part in providing him the basis for working out this Edition owed to the discussions which he had had in and out of the class room with thousands of fellow students during the past ten years. From the point of view of the practitioner will be of perhaps greater interest what the writer has gained from experience as a consultant from his conferences on the scope of their functions with public officials and regulating bodies and particularly from his service as counsel under railroad executives and traffic officers. In closing, peculiar indebtedness should be acknowledged to Dr. Lawrence B. Evans, formerly head of the Department of History and Public Law in Tufts College now of the Massachusetts Bar, who has done practically all the work of revision on the two chapters on the important questions of Local Discrimination and Court Procedure with the skill and knowledge of an expert in governmental and economic learning.

B. W.

Boston, *March 1, 1915.*

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The passage of the Federal Railroad Rate Act of 1906 has both emphasized the present importance and added to the future importance of the law governing the regulation of railroad rates. In all interstate shipments, which comprise so large a proportion of our railroad traffic, and in the local shipments of a very large number of our States, the maximum rates are now regulated by law; either directly by legislature, or (as is usually the case) by the action of a commission under authority conferred by the legislature.

It is hardly necessary at this time to call special attention to the practical importance to every member of the community of the charges made by the railroads. To the vast majority these charges are an important part of the cost of their food; it is in the power of the great trunk lines, except where the law can restrain them, by an increase of rates to cause a famine as serious as would be caused by a complete failure of the crops. To a great number of our people, on the other hand,—to the great farmers of the interior, to the ranch men of the plains, to the planters of the South, to the manufacturers of the seaboard, and to the millions of their employees who are dependent upon their prosperity,—railroad charges are of greater immediate importance. The railroads, if unrestrained by law, can prosper or can ruin them; they can build up a great and flourishing business, or they can turn an industrious city into a wilderness again. That power such as this should be the subject of legal restraint is inevitable; that the legal qualities and limitations of such restraint should be of the greatest interest to the profession and to the people at large is clear.

From the earliest times some restraint has been exer-

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cised over such lines of industry as are of vital interest to the public. The establishment of the King's peace, the protection of the weak against the actual physical violence of the strong, is the fundamental function of government in the modern sense; but of equal importance and of almost equal antiquity is the protection of the common people against the greed and oppression of the powerful. In matters not vital to the life and well-being of mankind the laws of society may be left free to operate, without limitation by the sovereign power; but in all that has to do with the necessities of life the protection of the sovereign is extended. He protects equally against physical violence and against oppression that affects the means of living.

In modern times the prevalence in commercial life of the principle of *laissez faire* has led to the formation of great industrial combinations. Great enterprises have taken the place of small ones, and great industries have been localized at the most convenient parts of the country. All this commercial organization has been based upon the development of railroads; which are necessary not only to bring the raw material to the factory and to distribute the finished product, but also to supply with the necessities of life every inhabitant of the country. The result has been the establishment of great and powerful corporations in whose hands is the railroad carriage of the country. But as these great combinations of capital have grown up under the law, so their legal rights must be subject to the rights of the whole people; great power brings as its consequence the need of control of that power for the good of the whole people.

Two ways only can be found to exercise such control. One way, that advocated by the most radical statesmen, is the government ownership and operation of the railroads. The other way, which is in fact the conservative method of dealing with the problem, is the control of the rates and practices of the railroads for the public good.

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One or the other of these methods must be finally adopted. The conservative method is now on trial. It behooves the lawyers to see to it that it be so intelligently tried, and that the law applicable to the case be so accurately enforced, that we may not be driven perforce to the radical alternative of public ownership.

The belief that this duty has, almost without warning, been thrust upon the profession, and that the average lawyer has not been prepared either by study or by experience to solve the difficult questions that may arise, has led the authors to prepare and publish this treatise, with the hope that it may help the profession to meet its new and perplexing problems. But in order to render such assistance, it seemed to the authors that a treatise which merely collected and discussed judicial decisions upon railroad rates would be a very imperfect work. The law of railroad rates is based upon the general principles of public-service law and cannot be mastered without an adequate knowledge of that law. The first task of the authors has therefore been to give a sufficient though concise view of such portions of the primary obligations of those in public employments, and particularly of carriers, as bears essentially on the problem of rates. For this portion of their subject the authors have been prepared by special studies during the last ten or twelve years; and though the subject has not been greatly elaborated, it is their hope that this first part of the treatise will be found generally useful.

That portion of the subject which deals more particularly with the fixing of rates has been studied with patient care, and authorities have been sought wherever it was thought they could be found. As this is a topic in the law of public employments, the doctrines involved are the same whether the rates in question are those of railroads, or of gas or water companies, or of other companies engaged in a public employment. Cases therefore involving the rates of these companies have been sought

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and cited. Even including these cases, the judicial decisions in which the law governing rates has been involved have been few and almost invariably recent; for the importance of the law is new. It has, therefore, seemed best to examine the most important decisions in detail and to give in many cases the very language of the courts; since thus only may the reader have an accurate knowledge of the current doctrine and its probable development. Not that the authors have hesitated to express their own opinions upon novel or difficult points; indeed, they fear that the bar may feel that they have been too free in giving their own views of the law.

In dealing with rate problems, the authors have cited and examined the decisions of the Interstate Commerce Commission in the same way that they have cited and examined those of the courts. They regard this course of action as most important. Not only in proceedings before the Commission itself, but even in the Supreme Court of the United States, these decisions have been cited as authoritative; and with the increased power given to the Commission by the late Act its opinions will have an increased importance and will contribute most materially to the development of the law.

Our purpose has involved not merely a study of the common law as it bears upon railroad rates, but an examination as well of the statutory provisions. We have given the full text of the Interstate Commerce Act as it now stands, with full annotations including the decisions of the Commission and of the courts. We have also given such parts of the State acts as were thought to be of use in such a book, our idea being to let a lawyer in any State know what sort of statutes there are in other States.

This treatise aims to give not merely the law of railroad rates, but also the practice before the Interstate Commerce Commission. For this purpose those sections of the Act which touch on practice have been annotated

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with especial fulness, and in the Appendix have been included the Rules of Practice of the Commission and a set of approved Forms. This, it is hoped, will assist lawyers who will be engaged for the first time in practice before the Commission by reason of its enlarged powers and increased functions.

A few words of apology must be added. While the authors have been studying this subject for many years, and have had the great advantage of discussing it with successive classes of students during that period, they undertook to write this treatise in a very few months, their idea being that to be of real use to the profession the book should be published as soon as the new federal legislation went into effect. For those who can realize by experience the labor of writing and putting through the press a work of this size and scope in so short a time the errors, typographical and otherwise, will appear not unnatural or altogether inexcusable. Many such errors will be found; we hope however, that nothing of the sort will be so serious as to obscure the meaning of the text, and that the practical usefulness of the book will not be affected.

J. H. B., JR.
B. W.

CAMBRIDGE, *July* 1, 1906.

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RAILROAD RATE REGULATION

BOOK I

JURISDICTION OF THE COMMISSION

CHAPTER I

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§ 1. Public callings and private business.

The difference between public callings and private business is a distinction in the law governing business relations which has always had and will always have most important consequences. Those in a public calling have always been under the extraordinary duty to serve all comers at reasonable rates, while those in a private business may always refuse to act unless they are paid any price they may choose to ask however exorbitant. So great a distinction as this constitutes a difference in kind of legal control rather than merely one of degree. The causes of this division are, of course, rather economic than strictly legal; and the relative importance of these two classes at any given time, therefore, depends ultimately upon the industrial conditions which prevail at that period. Thus in the England which we see through the medium of our earliest law reports, the mediæval system of established monopolies called for the legal requirement of indiscriminate service from those engaged in almost all employments. There followed in succeeding centuries an expansion of trade which gradually did away with the necessity for coercive law. Indeed, in the early part of the nineteenth century, free competition became the very basis of the social organization, with the consequence that the

recognition of the public callings as a class almost ceased. It is only in very recent years that it has again come to be recognized that the process of free competition fails in some cases to secure the public good; and it has been reluctantly admitted that State control is again necessary over such lines of industry as are affected with a public interest.

Topic A. The Early Policy of Regulation

§ 2. The mediæval theory of State control.

The mediæval system involved almost universal regulation of all the doings of men, and therefore its commercial policy was almost completely restrictive. The ideal held was a society in which all things were ordered, the full conception being that every man had a right to his place in this established order. This state of affairs was by most men greatly desired. Indeed, a regulated monopoly with the corresponding obligation of public service seemed in that age to the great majority of people far better than an unregulated competition without public obligation. It was thought that things were put in a true balance by requiring each person to perform his part and allowing no person to interfere with the employment of another. And all of this control of industrial affairs was felt to be ultimately for the benefit of the whole public who could obtain thereby without favor at reasonable prices proper service in accordance with their requirements. In this industrial regulation it has been well said that the mediæval system was a consumer's policy by reason of its limitation of prices, far more than it was a producer's policy by virtue of its monopoly of service.

§ 3. The regulation of business in the middle ages.

In mediæval England this thorough system of State control reached a high state of development. Most of the trades in the towns were parceled out to the guilds. Under this system the services to be rendered to the

public in the trades were governed by gild codes. These by-laws were continually declared void by the local courts if they were really inconsistent with public service. In the country at the same time there were to be met similar privileges in carrying on business in connection with the manorial system. Some business required the investment of more or less capital in constructing a plant, as the bakehouse and the mill. It may have been necessary at the outset that these should be provided by the lord of the manor; at all events in later times the seignorial ban covered these, the lord granting franchises to certain persons. Here again those who conducted these businesses were bound to serve all fairly or answer for it to the courts of the manor. But, upon the whole, the ordinary trades and crafts were more freely open to anyone in the country than in the towns with their craft gilds and merchant gilds. This may explain why the cases requiring public service of carriers and inn-keepers, ferrymen and farriers, appear so early in the royal courts; for there were no local courts with clear jurisdiction over the lines of travel across the country.

§ 4. Early differentiation of the public service law.

Thus there is to be found from the earliest times a peculiar law governing the conduct of those engaged in a public employment. The characteristic thing then as now was the legal imposition of an affirmative duty of proper actions upon those who openly professed a public employment, while those who carried on private business were under practically no duties which were not pure negative in character. This general distinction between the legal obligations of those in public calling and in private business was often of the utmost importance in our early common law. Indeed, whether the defendant was in common employment or not, made more difference in the success of a plaintiff's action or its failure than it does to-day. In those days contract law was so undeveloped

that in an ordinary business one could not be held to his bargains, yet at that time in a public calling such as innkeeping one was held to the public undertaking he made to serve all that might apply. So, too, while the law of tort as yet gave no remedy against one for negligent injury to property voluntarily intrusted to him in the course of ordinary business, in a public employment such as that of the blacksmith one was answerable for failing to use proper skill in the calling he had assumed. However obsolete this substantive law may be as to private business, the subsequent developments in the law in no manner affect the force of these decisions in establishing the fundamental difference in legal situation between those engaged in public employment and those in private business. The law which suffices for ordinary businesses has never been enough for the protection of the public in their dealings with these extraordinary services. Special law has always been necessary for the regulation of prices in public employments; and these principles of our common law are for all time.

§ 5. The history of the carrier.

From the earliest times it has been agreed that the common carrier of goods is in a public employment. A statement of the early law is to be found in one of the leading cases on carriers, *Jackson v. Rogers*.¹ "This was an action on the case for that whereas defendant is a common carrier from London to Lymmington *et abinde retrorsum*, setting forth as the custom of England, that he is bound to carry goods, and that the plaintiff brought him such a pack, he refused to carry them, though offered his hire. And held by Jeffries, C. J., that the action is maintainable, as well as it is against an innkeeper for refusing a guest, or a smith on the road who refuses to shoe my horse, being tendered satisfaction for the same.

¹ 2 Show. 327 (1683). The whole report of this case is included in the quotation which follows.

Note, that it was alleged and proved that he had convenience to carry the same; and the plaintiff had a verdict." In Plantagenet England the population lived apart in separate communities. Small attention was paid to the roads connecting them which were no more than trails winding through the wilderness. No cart could pass over them, only pack animals with the goods in their panniers. So many were the bands of outlaws in the greenwood that no man might with safety traverse these paths alone. The transportation of goods was, therefore, given over to the carrier, who traveled oftentimes with trains of pack animals, and a considerable company. Few would pass over the same roads between the same towns, because the traffic was still comparatively small, as England had as yet but little beyond a local economy where each community was sufficient to itself, into a national economy which involved interchanges of goods between distant markets. The conditions surrounding transportation, therefore, were those of virtual monopoly. The merchant must appeal to the protection of the law, a protection without which he was at the mercy of the carrier with whom circumstances forced him to deal without a chance for choice.

§ 6. The position of the wharfinger.

In a commercial port those who own the convenient sites for wharfage upon deep water possess a peculiar advantage. It was of such wharfinger that Lord Hale in his *De Portibus Maris*² wrote the most famous paragraph in the whole law relating to public service. It is there that he says that whenever the king or a subject have a public wharf to which all persons must come who come to that port to unload their goods—"in that case there cannot be taken arbitrary and excessive duties for crantage, wharfage, etc., but the duties must be reasonable and moderate, for now the wharf and crane and other con-

² Hargrave Law Tracts, 78.

veniences are affected with a public interest and they cease to be *juris private* only." No more significant phrases were ever penned.

§ 7. Continuance of State regulation.

The irresistible advances of the modern competitive system gradually worked the destruction of the mediæval organization of industry. Great, however, as was this change from the old economic theory to the new, it was gradual, and it was never complete. There was a swing of the pendulum. General but not absolute restriction of freedom of trade was the policy of the middle ages; general freedom of trade, with the restriction of certain exceptional occupations, has become the policy of modern times. A state of free competition has been for several centuries now considered to be for the best interests of society; and, therefore, in modern times almost every business has been opened to almost every man. And yet at all times in economic history, both restriction and freedom are to be found in the law. The proportion, however, changes greatly. In one epoch there is much legal limitation, with little freedom left; in another age there is almost universal competition, with some little franchise to be found. And the rule will generally hold true that the more the natural laws of competition regulate service and price, the less the State need interfere in these respects; but conversely when competition ceases to act efficiently State control becomes necessary.

§ 8. Parliamentary regulation of rates.

During this transitional period when the mediæval system of customary laws ceased to operate effectively, Parliament itself frequently regulated the prices of necessities of life by direct legislation. The great staples, like wool and food, were habitually regulated in this way, and the employment and the price of labor was a subject of statutory provision. Thus, in 1266, Henry III, after

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reciting former statutes to the same effect, regulated the price of bread and ale according to the price of wheat and barley, and forbade forestalling; that is, cornering the market. In 1337 it was made felony to export wool, and the importation of cloth was forbidden. In 1349 all laborers were obliged to serve for the customary wages, and "butchers, fishmongers, regrators, hostelors (i. e., inn-keepers), brewers, bakers, poulterers, and all other sellers of all manner of victuals," were bound to sell for a reasonable price. These statutes continued in force throughout the middle ages, and until after the settlement of America.

§ 9. Restriction of prices in the colonies.

This legislative power the colonists brought to America with them. In a new colony life is a serious thing, the necessities of life are scarce, and the needs of the public are pressing. The conditions are ideal for a distressing cornering of the market by merchants. Accordingly, though most of the statutory regulations of trades and prices had either been repealed or had become obsolete in the mother country, the colonies at an early time passed statutes regulating the prices of staple commodities. Thus in Massachusetts in 1635 shopkeepers and merchants were forbidden to charge excessive prices. In Plymouth colony the price of boards was fixed in 1668. Corn and tobacco, beer and bread, beef and boards, all that was most important for the colonists to have was regulated as a matter of course by the assemblies of the time.

§ 10. Persistence of the legislative power.

This extreme form of the police power over public employment remained in the legislative branch notwithstanding the general guaranties of individual liberty contained in the American constitutions. To compel the proprietors of those businesses which had been regarded

as peculiarly affected with a public interest to serve all that applied at reasonable rates was immemorial practice, and therefore was indisputably due process of law. This historical argument was given chief place by the Supreme Court of the United States in the leading case³ on this branch of the police power. "Under these powers," said the court, "the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day, statutes are to be found in many of the States upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property."

§ 11. Survival of the common law.

From one point of view the constitutional validity of legislative control is conclusive evidence of the persistence of the common-law principles regulating public employments. The common law persists from age to age, and though the instance of its rules may be seen to change as old conditions pass away and new conditions arise, its fundamental principles remain. The early cases which were just under discussion are illustrations of this course of events. Barber, surgeon, smith and tailor are no longer in common calling because the situation in the modern times does not require it; but innkeeper, carrier, ferryman and wharfinger are still in that classification, since even in modern business the conditions require them

³ *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77.

to be so treated. With changed economic conditions in modern times new callings have come into being with such potentialities that this special law has been utilized as never before in regulating them. Indeed, from the point of view of one who believes in our common law the class of public callings is capable of indefinite extension whenever new conditions bring new employments within its scope.⁴ And in all times our law has held to the principle that this peculiar regulation was necessary in certain kinds of business. It depends largely upon the opinion current at the time how far this law shall be extended. But, however much public opinion may change, this possibility of the enforcement of the obligation to the public owed by those who conduct a business public in character, remains.

Topic B. Persistence of State Regulation

§ 12. Introduction of improved highways.

What was destined to give the greatest scope to the public service law was the improved facilities for transportation. It was late in the eighteenth century that the need for transportation of persons and goods more quickly and more cheaply between distant communities began to outgrow the facilities for commerce then at the disposal of the public. The solution of this question thenceforth became one of the most pressing economic problems of the time, engaging the attention of statesmen, as every great commercial problem must. The scheme gradually worked out was a system of improved turnpikes all over the country supplemented by toll bridges, and between the most important markets the construction of canals and the development of existing water ways. The theory of the statesmen of the early nineteenth century, who dealt with the conditions under which these

⁴The historical argument is effectively used in many cases, but in no one is it more elaborately put than in *People v. Budd*, 117 N. Y. 1, 22 N. E. 670, 5 L. R. A. 549, 15 Am. St. Rep. 460 (1889).

works of internal improvement should be constructed, was that private enterprises were better than State ownership. However, they were willing to meet the need of the time for immediate construction of these expensive works by grants from the State treasury or by guaranty of the bonds of the private companies. These improved highways were considered like other highways, public in character and open to all, though maintained by private companies which were given the franchise to charge tolls, without which none could be demanded.

§ 13. The building of turnpikes.

On important lines of travel even over considerable spans, bridges began to replace the ferries. As the ferries had been maintained by private parties with an exclusive franchise, charging ferriage, the bridges were built by private companies with an exclusive franchise such as the ferryman had, charging tolls as the ferryman did. For the charging of tolls it is to be remarked a rough classification was made, and on that point there is some public service law from this period. One interesting scheme was the chartering of bridge companies with the provision that when the cost of the bridge, together with a certain per cent of profit should have been repaid to the proprietors, the bridge should become free. Throughout the country, turnpikes were constructed of various kinds, gravel roads and plank roads, for example. These were built by private companies with a protecting franchise, charging tolls roughly classified. Some little public service law dates from this period; for such improved highways were regarded as public in character by whomsoever owned. As one court⁵ put this principle in those earlier days: "Though the ownership is private, the use is public. So turnpikes, bridges, ferries and canals, although made by individuals under public grants, or by companies, are regarded as *publici juris*."

⁵ The quotation is from *Olcott v. Supervisors*, 16 Wall. 678, 21 L. ed. 382 (1872).

§ 14. The era of canal construction.

In England the canal period was of considerable duration. Construction was begun soon after the middle of the eighteenth century and did not noticeably cease until about the middle of the nineteenth century. From the first the canals carried a very large traffic upon which they imposed regular tolls upon a classified basis. In the United States also many canals were constructed, largely aided by the State governments. At one time it seemed to the most enthusiastic believers in the canal system that it was the ultimate solution of the transportation problem. It was recognized in all cases that all boatmen had the right to pass through these canals upon paying to their proprietors the established tolls. Much public service law dates from this time. The cases upon the proper priorities to be observed in the management of a public business are particularly interesting.

§ 15. The coming of the railways.

It is a matter of history that where the first railways were laid down at the beginning of the nineteenth century the theory upon which they were constructed was that they would be public highways, for the use of which those that drove their vehicles over them should pay toll as for the use of a turnpike or a canal. The introduction of the steam locomotive brought about the end of that theory almost before it was put into practice. A train drawn by a locomotive was too expensive, the operation was too costly, and its management too intricate for any shipper, or even for any private carrier. Almost from the outset, therefore, the railway company provided and operated the engines and cars themselves, and accepted for transportation such goods as were offered. When the right of eminent domain was first given to the early railroads its constitutionality was doubted, as the railroads had now become carriers. All such doubts were set at rest by the masterly opinion of Chief Justice Ruffin in *Raleigh &*

Gaston Railroad v. Davis,^{*} in the course of which he showed his appreciation of the benefits accruing from the undertaking of public services by private concerns.

§ 16. Transportation facilities as a class.

In the first part of the nineteenth century, therefore, the generalization was being made (and not without a certain justification from the facts) that all of the public employments were connected in one way or another with transportation. Indeed, this generalization became so accepted that when later in the century new conditions pressed for further application of the law requiring the service to the public, the attempt was made in the first common-law decisions dealing with these businesses to include other services quite different in character within this generalization. Thus telegraph companies and even telephone companies were said to be common carriers, and sleeping cars and steamboats were by some thought to be inns. But those judges who looked at these new callings in this light saw through a glass darkly. It was given to others to see the vision of a great class of public callings of which those connected with transportation constituted but one branch, although the principal one.

§ 17. Alteration in economic conditions.

In the early part of the nineteenth century a combination of economic factors brought about in the business world as near an approach to a condition of freedom in competition as can ever happen in a world limited by time and space. Naturally enough with such individual freedom of action *laissez faire* became the accepted policy for dealing with the business world as the occasions for the application of the principles of law regulating public callings become fewer. This condition of affairs prevailed to a remarkable extent in the United States during the first half of the nineteenth century. The English

^{*} 2 Dev. & Bat. 451.

system of excessive legislative regulation by Parliament having become distasteful, the constitutions of the original States and of the United States carefully limited the power of legislatures to interfere with the ordinary affairs of business. Regulation of private affairs by the law may be said to have been at a minimum in the first half of the nineteenth century. And in this time of small enterprises it was safe to leave the individual proprietor free to deal with his customers as he pleased.

§ 18. Development in the common law.

It is almost a truism that the spirit of the age molds its law. Those who frame the laws are members of the community and share its spirit. The age's ideal of right is their ideal, the method of thought about justice which is prevalent at the time is their method of thought, too; and it therefore follows that in working out legal problems, both bench and bar work along the lines prescribed by the spirit of the age in which they live. Nowhere is the influence of the spirit of the time on the common law more evident and more potent than in this question of the regulation of common callings. Following the change in economic thought which has been described, the judges of the last century began to say as to his business activities that it lay with the tradesman to conduct his business as he pleased, at his own prices. This was a period when all men were much attracted by the theory of *laissez faire*—that the most desirable thing was the least possible interference with business relations by the State. That the coercive law of public calling survived this period is proof positive of its absolute necessity to a greater or lesser extent in every society.

§ 19. Special restrictions in early charters.

One method of regulation of enterprises public in character during this period has not been mentioned as yet. These were great undertakings which were projected—

bridges and turnpikes, canals and railways. To carry them out required aggregated capital; to maintain them required permanent organization. There was a form of organization as yet confined to purposes in some degree governmental, which was best designed to bring together the necessary capital and give the necessary permanence—the corporation. And although it was not as yet considered proper to give this franchise of being a corporation to men engaged in purely private business, it was thought most appropriate for the State to create a corporation for such purposes. Moreover in granting the franchises the State could impose upon the grantee such terms as it might think necessary for the protection of the public in its dealings with the corporation. And so the charters of this period are often elaborate in their provisions, imposing upon the corporation the duty to serve all that apply properly and without exceeding a certain fixed profit. Thus the beginning of statutory regulation of the American railways is coeval with the railways themselves. The first railway charters contained regulations as to the doing of the business, which have been of considerable importance in the history of statutory regulation. One of the earliest such charters was that of the Baltimore & Ohio Railway in 1827. This charter, among other provisions, limited the amount of tolls to be charged for freight and also expressly reserved to any future company the right to connect with the road. The charter of the Worcester Railroad in 1829 limited the toll to six cents a ton per mile. Other charters limited the earnings of the railroad to a certain percentage each year to amounts varying from ten to twenty-five per cent per annum.

§ 20. The struggle against encroaching monopoly.

As the prevalence of competitive conditions in business limits the application of the principles of public service law, so the prevalence of monopolistic conditions extends their application. Such a change came about in

the latter part of the nineteenth century. About a generation ago a change in commercial practice showed with remarkable distinctness the advantage of combination. Great enterprises took the place of small ones, and great enterprises required co-operation and combination. As the people became accustomed to look upon combination as the price of success, they came more and more to regard it as a blessing rather than an evil; and public opinion has gradually turned away from the individualistic ideal until to-day it has been fairly discarded by the current philosophy. With the principle of combination as the spring of action has come a corresponding need of controlling the action of such combinations for the good of the whole public. As the rights of the individual trader yield to the rights of the great corporation, so in the view of the man of the present day, the rights of the corporation, should in their turn yield to the rights of the whole people. The same spirit which fosters combination, fosters also control of the combination for the public benefit. The spirit of the present age, therefore, has come to be a spirit which demands that great business enterprises should be conducted in accordance with the requirements of society. The programme of organized society is practically to see to it that those who have gained a substantial control of their market shall not be left free to exploit those who look to them to supply their needs. Men now see clearly that freedom of action in the industrial world may work injuriously for the public, and it must then be restrained in the public interest. Having seen the results of unrestrained power we no longer wish those who have control of our destinies to be left free to do with us as they please. Such liberty for them would mean enslavement for us.

§ 21. Conservative and radical views of regulation.

While it is generally agreed that a change has come over the spirit of our time, that State regulation is the prevail-

ing philosophy of the people at the beginning of the twentieth century; it must be borne in mind that this has been the result of a gradual progress of thought, and that this progress has not affected all men or all lawyers equally. Now, as at all times, there are conservative lawyers and radical lawyers, the former as far behind the prevailing spirit of the time as the latter go beyond it. In every change of popular thought there have been laggards, and in every such change there have been those who are unable justly to estimate the true meaning of the change, and work beyond it into eccentricities in which the people will never follow them. We have, therefore, three general types of thought at every time: the conservatives, the moderates and the radicals. And this is as true of legal as of economic thought. Many lawyers still hold conservative views as to the application of the law of public callings to modern conditions. They believe that the conductors of every business, however necessary to public welfare, should do whatever seems good in their own eyes. And some economists still tell us that the only way to get efficient service for the public is to allow the public service companies the right of exacting such rewards as they are able to get. But in spite of these now obsolescent views there can be no question that the tendency to-day is to restrain in the interests of society all business which has obtained undue power. Individual freedom is limited by the modern notion of social justice.

Topic C. State Control of Public Utilities

§ 22. The public services of the present day.

Whatever way we turn to-day we depend upon a service that is public in character. Not only in long travels but in short journeys we employ common carriers—railroads and steamships, coaches and cabs, street cars and omnibuses, the subway car and the elevated train. If we ship goods there are various transportation services at our disposal—railroads and ships, express companies and dis-

patch lines, refrigerator lines and tank cars. If we are journeying we eat at hotel restaurants, and put up at public inns, or travel in palace cars and lodge ourselves in sleeping cars. Our freight in its transit has its needs attended to: for our goods, warehouses, for our grain, elevators, for our cattle, stockyards, and for our exports, docks. In almost every community, even relatively small, we have for our household needs gas, electricity, water supply and sewerage service provided for us, usually, except the last two, by private companies in public service, and always to the law governing public service, even when provided by the municipality itself. For speedy communication in our business and pleasure, we have the telephone and telegraph in common use, and ticker service and messenger call for special needs. One may judge by this incomplete list how common to every part of our modern life are the various public services, and how necessary it is that they should be required by law to serve us all with adequate facilities for reasonable compensation and without discrimination.

§ 23. The effect of natural monopoly.

The case for public service is plainest in those few utilities where there are natural limitations upon the sources of supply which are essential to the business. This situation in itself gives some degree of monopoly to those who control the sources of supply most accessible to their market, in preventing effective competition with the local service already established. Thus those who control the most advantageous watershed have a natural monopoly of the supply of water in a given district; and so by established law the waterworks established to distribute water to a community must supply all that apply to the extent of their undertaking. So too an irrigation system by which a stream is impounded and its water is distributed over lands within its flow has a public character. Sites where water power may be developed to greatest advan-

tage are necessarily limited; and, if the enterprize contemplates the sale of water power at the canal to various users, it would seem that there should be no discrimination therein. For like reasons those who have pre-empted the natural gas fields must deal without discrimination with the public which they have assumed to serve therefrom. All members of the public within the range of the operations of these systems may demand that the law put them upon an equality with their neighbors in obtaining these services so necessary to their welfare. For were not the law ready to act in their behalf there would be the gravest danger of intolerable injustice.

§ 24. Difficulty of distribution as a factor.

Another natural limitation upon competition results from the character of the product. If the physical characteristics of the product are such that it can only have a local distribution the barrier against outside competition may fairly be said to be natural. What after all is that element in the situation which makes the sale of gas a public employment, while the vending of candles is a private business? Is it not that the box of candles may be sent from any factory to compete in any market, while a thousand cubic feet of gas can only be got in any particular community from the pipes of the local company? Much the same argument could be made in differentiating the supply of electricity from the sale of energy in the shape of coal; and indeed electric lighting was held to be a public service from the moment of its first installation upon a public basis. Electricity must be distributed over a wiring system as it is made; it cannot be transported independently and stored indefinitely. The purpose for which the supply is used would seem to be immaterial so long as thereby a public need is satisfied. Nevertheless there have been some doubts raised about the public status of an electric company supplying power exclusively. To give a modern example of a public employment made

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such by the special character of the product supplied and the peculiar necessities of the local public, one might instance the ice-plants in the cities. It may be predicted with confidence that the ice-plants will henceforth be found upon the list of those businesses so important to the public that they can no longer be left to the private hands without public control.

§ 25. Scarcity of advantageous sites.

The sites upon which certain services can be conducted to best advantage are few in number. In *Munn v. Illinois* (perhaps the leading case upon public employment) the Supreme Court spoke of the grain elevators as taking toll at the gateways of commerce. Likewise the owners of the established docks obviously command the situation; and this is the explanation of the fact that wharfingers are held to serve the public. The necessity of these locations to proper conduct of the business may be so great that those who are possessed of these sites may well be said to enjoy a natural monopoly; since if others venture to establish themselves at all at such disadvantage, their competition will be comparatively ineffectual. At all events, those in the favorable locations could exact higher prices than would be fair, were it not for the fact that the law intervened. Terminal facilities, such as union stations furnish the most striking examples of this importance of particular sites; and there are cases compelling them to take in all railroads desiring entrance. To a lesser extent this is true of those services which although not dependent upon an exact location are operated with peculiar advantage in particular areas, such as stockyards, which by recent decisions have been held subject to public control of their business conduct.

§ 26. Limitation of available time.

Another obvious restriction upon effective competition results from limitation of time. When the need of the ap-

plicant is immediate, the person from whom he asks service has an unfair advantage. It is this instant need which gives to those agencies established for the rapid transmission of intelligence that virtual monopoly which the earlier telegraph and the later telephone have always had. The very nature of their business is such that one must deal with the established plant upon whatever terms its owners are allowed to make. This is equally true of news-gathering agencies such as the press bureau, and the stock tickers. There are those who must have this service in their business or they cannot get on at all in competition with their rivals. Thus the law must step in and see to it that only reasonable rates are imposed. In these businesses public regulation of the service furnished is peculiarly necessary, or else public needs will not be met. There are other ways of sending communications by mail or by messenger, but since time is of the essence here they are not effective substitutes. It is not accidental that the telephone cases and the associated press cases furnish the best discussion of the fundamental basis of the special law of public employment. Obviously this coercive law is imperatively required to meet the monopolistic conditions surrounding these peculiar services.

§ 27. The public services a necessity.

The test here suggested is that whether a business is public or not depends upon the situation of the public with respect to it. Wherever there is in private hands substantial control of a public necessity, it may well be said that the public has now an interest in the conduct of these businesses by their owners. Since these agencies are carried on in a manner to make them of public consequence, they have become affected with a public interest. Therefore, as the old books say, having devoted their property to a use in which the public has an interest, they in effect have granted to the public an interest in that use, and must submit to be controlled by the public.

for the common good to the extent of the interest they have created. It is only a few years since we have had any detailed law for the regulation of public services. If they did not refuse to render their usual service, and did not charge extortionate prices, little fault was to be found with them in the last generation. Now we are demanding of them the utmost service which they are capable of rendering, upon the terms of full equality for the whole public. If they do not increase their facilities to meet the needs of their growing business, and if they give one customer in any way the least advantage over another, we sternly call their owners to account.

§ 28. Economic limitations create public employment.

The conditions which may produce virtual monopoly, such as natural sources of supply, restricted opportunities of access, limited time at disposal and difficulties in distribution have just been discussed. But of almost equal importance are other factors producing true economic monopoly by deterring effectual competition, such as the cost of the plant, the large scale upon which the business is done, the absence of effectual substitutes and the dependent position of the particular service. These elements in the general situation have doubtless already been taken into account unconsciously; but they are of such importance as to deserve mention. These economic forces of various sorts may either singly or in combination with others, naturally result in a given business in a monopoly of a sort which bids fair to be permanently characteristic of that employment. In these businesses the larger the scale upon which the business is done the lower the cost of performing the service. In such businesses there must be such great sums expended in construction of the plant that none would venture to sink an equal sum in a competing service at the risk of total loss in case of failure. The common fact therefore in all instances of public employment is virtual monopoly so established in the

nature of things that society must reckon with it. And it matters not by what conditions this situation is established so that it has the elements of permanence.

§ 29. Cost of the plant.

The usual characteristic of a public service is the relatively large cost of the plant. In very many instances this runs high into millions which must be invested before the service can be begun. This necessity of getting together so much capital limits fundamentally the amount of such construction. Canals and railroads furnish the chief examples of this. It would take perhaps twenty billion dollars to duplicate our present facilities for transportation; and it is, therefore, practically inconceivable that it will be done. Moreover, in most monopolies there is still another reason why capital is kept from investment in a competing service. The capital invested must be sunk at the risk of failure in this one market. The investment made in such services cannot be withdrawn. Public privileges may be given to a business public in character; and by the same token public regulation of such businesses as are affected with a public interest is justifiable. But what those businesses are depends upon what the experience of our time is and what our insight into the situation with which we are confronted teaches us. Thus to the enormous cost as a deterrent to competition is added the imminent risk of total loss in a desperate competition in which one must perish.

§ 30. Service on a large scale.

The applicant who wishes an individual service of the kind rendered by the established company is almost always at great disadvantage relatively in supplying himself. It is, of course, rare that the possibilities in any given case will be so restricted that if the applicant is refused service by the particular company no alternative is open to him; usually in some way or other he could hit

upon some way out in such a case. But the alternative offered will often be an inadequate substitute, disadvantageous to a greater or lesser degree. In such a situation there is no effectual competition to regulate the action of the original company, and without the interposition of the law there might be great oppression. It is plain that a railroad may not base its rates to a particular shipper upon what it would cost him to cart his goods to market. The mere fact that there are two services is not enough to alter the fact that the situation is essentially monopolistic, for if one may refuse service, the other may also. This would be plainly true in the case of a city where there were two competing telephone systems. There are, therefore, extrinsic conditions by which it is to be determined what businesses are affected with a public interest; and the law must here as elsewhere deal with existing facts.

§ 31. Legal privileges accompanying public employment.

That legal privileges frequently accompany public employment is a coincidence that has struck many observers as a characteristic of the whole class. It is indeed common to find in the case of public employments of all sorts the enjoyment of an exclusive franchise, or the exercise of eminent domain, the use of the streets, or even a direct grant from the public treasury. The common argument is that because these businesses have been granted these privileges they have thereby acquired their public character. It is submitted, however, that under our constitutional system no special privileges can be granted except for a public purpose; for unless there is public interest apparent the grant is void. We have seen already that the conditions of virtual monopoly, however caused, may give rise to public calling, even when the State has had no hand in the establishment of the situation. This is most suggestive; indeed, one is thus led to an entire inversion of the common statement of the relation between

the existence of public privileges and the establishment of public employment. The real truth of the matter seems to be in the opposite statement, that no business can be granted a privilege under our constitutional system unless it is public in character.

Topic D. Modern Regulation of Public Services

§ 32. Necessary regulation of virtual monopoly.

A review of all of the instances of public employment which have been cited in the course of this whole discussion will show that this conception of virtual monopoly will cover everything. Nothing narrower will do, as for example the difference sometimes put forward between the undertaking of a public service in contradistinction to the furnishing of a public supply. Now, it is true that most of the cases are cases of service—the railway and the warehouse, for example; but other of the cases are of supply,—the waterworks and gas works, for instance. Indeed, there is nothing in this distinction, either in economics or in law. It is submitted that any business is made out to be public in character where there is a virtual monopoly inherent in the nature of things. If virtual monopoly is made out as the permanent condition of affairs in a given business, then the law, it seems, will consider that calling public in its nature. On the other hand, if effective competition is proved as the regular course of things in a given industry, the law will hold all businesses within it as private in their character. Under our constitutional system a distinction is made upon this line. In the public calling, regulation of service, facilities, prices and discriminations is possible to any extent. Monopolistic conditions demand such policy; and at no period in history has this been more apparent than now. In the private callings no such legislation should be permitted. Where competitive conditions prevail there should be freedom; and at no epoch in our industries has it been more important to insist upon this. Wherever there is established

monopoly in a business of public importance at any time and from any cause, the protection of the law is requisite, requiring that all shall be served on a reasonable basis. But wherever competition prevails it may be relied upon to bring about all these results by its own imperative laws.

§ 33. Economic conditions at the present time.

As a result of these changed business ideas, and of the great inventions which have constantly tended to increase the magnitude of business enterprises there has been as has been seen in the last fifty years a great growth of employments which have gained virtual monopoly in matters of public necessity. The positive law of the public calling is the only protection that the public have in a situation such as this, where there is no competition among the sellers to operate in its favor. So much has our law been permeated with the theory of *laissez faire*, which was but lately so prominent in the policy of our State, that the admission has been made with much hesitation that State control is ever necessary. But the modern conclusion, after some bitter experience, is that freedom can be allowed only where conditions of virtual competition prevail; for in conditions of virtual monopoly, without stern restrictions, there is always great mischief. There is now fortunately almost general assent to State control of the public service companies, since it is recognized that the special situation requires an exacting law.

§ 34. Control of the public services.

In recent times there undoubtedly is an increasing need of this stricter regulation of all employments which appear to be affected with a public interest. While it is true that there are many men who still avow the principle of *laissez faire*, who say that it is the better policy to leave all business with as little interference from the law as possible; the most of men at least appreciate that the law has already taken control of the situation for all time. It is hardly

too much to say that the efficient regulation of the public employments by sufficient law is the most pressing problem confronting this nation; and it must be met without further hesitation. As these great combinations of capital have grown up under the law, so their legal rights must be subject to the rights of the whole people. Great power brings as its consequence the need of control of that power for the good of the whole people. Two ways only can be found to exercise such control. One way, that advocated by the radical persons, is government ownership and operation of the public utilities. The other way, which is in fact the conservative method of dealing with the problem, is the control of the rates and practices of the public service corporations for the public good. One or the other of these methods must be finally adopted. The conservative method is now on trial. It behooves us all to see to it that it be so intelligently tried, and that the law applicable to the case be so accurately enforced, that we may not be driven perforce to the radical alternative of public ownership.

§ 35. Differentiation of the public service law.

The hypothesis here put forward is that whether a business is public or not depends upon the situation of the public with respect to it. Are there enough of such purveyors to serve the public? or are there, for permanent reasons, never enough? If so, there will be virtual competition; if not, there will be virtual monopoly. In all of the businesses to be discussed in these chapters, competition, although from a legal point of view possible, is from the economic point of view improbable. So far as one can see, virtual competition is at an end in these industries, and virtual monopoly will henceforth prevail. Therefore it must be said that the public has now an interest in the conduct of these businesses by their owners. They are affected with a public interest, since these agencies are carried on in a manner to make them of public consequence.

Therefore, having devoted their property to a use in which the public has an interest, they in effect have granted to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest they have created. Plainly we have in the accepted use of these phrases the manifestation of a deep-seated change in habits of thought. Only twenty-five years ago the general feeling as to every sort of industrial relation was that it was better to leave all alone, that it was better to leave people to work out their own salvation. But of late years we have been calling upon the State to save us from monopoly in all its forms; and we are impatient if it delays.

§ 36. Unity of the public service law.

Not only has it been realized at last that we have relating to the public services a distinct department of the law, but also it is becoming recognized that within this department there is a consistent body of law in process of unification. It is in the firm belief that the law governing the public services will prove upon analysis to be a really unified body that the author has been working for many years. Certainly the general propositions hold true as to all public employments—that all must be served, adequate facilities must be provided, reasonable rates must be charged, and no discriminations must be made. Moreover in dealing with the minor details of these principles, cases from one service will be found in point in another—what conditions there are precedent to service, what will excuse failure in provision of facilities, what is a proper basis for calculating rates and what differences constitute discrimination. It has been remarked many times that the common law may be relied upon to meet, by the continual development of its fundamental principles, the complex conditions created by the constant evolution in the industrial organization. One of the most striking of modern instances of this capacity of

growth in the common law is the astonishing progress in the working out of the detail of the exceptional law governing the conduct of public callings.

§ 37. The modern programme of State control.

In many of the States commissions have been established with full powers of ultimate supervision over practically all matters affecting the service, facilities, rates and discriminations of all the public employments now recognized as such. And in recent years the jurisdiction of the Commission at Washington has been extended extensively over interstate commerce until it includes not only common carriers and transportation facilities to a greater extent than at first, but such additional services as telephone and telegraph. Moreover, the powers of supervision of the Commission have been increased intensively by successive amendments to the Act beyond merely investigating conditions and reporting upon improper practices, as it did at first, to the present stage where it fixes rates and future service, and gives reparation and other redress for past misconduct. It is our conscious programme to make still more effective our policy of public control of private ownership, but there is danger that unconsciously by failing to do what is right to all concerned on all sides we may drift into a position where we may be forced into public ownership and operation. For if this systematic programme to regulate effectually the charges of the public service companies fails of something like full success, there is no alternative but State ownership with its unknowable consequences. As matters stand to-day the advocates of State control are really the conservatives.

§ 38. Overshadowing importance of rate regulation.

All people who come in touch with the problem of rate regulation by any method of approach are agreed as to its overshadowing importance. Extracts from some noteworthy opinions will serve to show what strong language it

is necessary to use to give any idea of vital consequence of the general issue. "The administration of justice," said Webster, "is the chiefest concern of man upon earth." Within the scope of that function of government there is, perhaps, no single topic of greater magnitude or moment than controversies which arise in trade and commerce. Said Sir Walter Raleigh, "Whosoever commands the trade of the world commands the riches of the world, and consequently the world itself." In a material sense, and in our astonishing civilization, nothing is more important than the transportation of commodities sold or interchanged, and in transportation the stability and reasonable character of the rates charged therefor is scarcely less important than transportation itself. The three grand departments of government, legislative, executive, and judicial, are with steady and swerveless purpose enacting or enforcing laws to safeguard the rights of the general public, and as well that portion engaged in the conduct of the public services.

§ 39. Present state of the public service law.

In the belief of the writer the public service law has at length reached a stage of development in which it may be possible to state its principles with some degree of confidence. It is only within the last few years that it would have been within the range of possibility to do this. Twenty-five years ago the public services which were recognized were still few and the law as to them imperfectly realized. It was known from olden times that those who professed a public employment must serve all at a reasonable rate. As to the duty to serve it was thought that there were exceptions. As to the restriction of rates there was no standard. The important duty to provide adequate facilities had hardly advanced beyond the general law as to negligence. And the duty not to discriminate, was denied altogether. Even ten years ago when these four obligations had become generally recognized,

the details as to them in regard to any particular employment had been worked out only in very fragmentary manner. But at the present day it is just being appreciated that rapid progress may be made by the general recognition of the unity of the public service law, whereby cases as to one calling may be used to show the law in all. Indeed, it is only in our present day that the attempt to treat the public service law as a consistent body of law could be made with any hope of success.

§ 40. Ultimate limitations upon public employment.

In this crisis of affairs the people must be assured that the law is indeed adequate to deal with the situation, that it has not only elaborated detail to meet obvious wrongs seldom defended, but also enlightened comprehension to deal with the large policies openly justified which are truly inconsistent with public duty. That those who profess a public employment owe the utmost public service should be generally accepted as the fundamental principle upon which the law governing public employment is to be based. It is not agreed, however, how far this principle should be pressed; there is a clash of interests here, and there is an inclination on the part of those who conduct the public services to contest every issue. This is hardly an enlightened selfishness; for it seems to many who appreciate the temper of the public, that the time has come when extension of the law and enforcement of it should be the avowed attitude of all conservative persons who wish the perpetuation of the present condition of individual enterprise. It would be well, therefore, if the restless and the doubting who see many abuses and many wrongs in the conduct of our public services without prompt remedy or adequate redress, might be relieved and heartened by being shown that the common law is adequate to deal with all real industrial wrongs, and that with the aid of remedial statutes the administration of the law can be relied upon. It should

be sufficiently emphasized at all times in all situations that public servants may not adopt to the prejudice of their public various profitable policies, and then justify them as inherent rights which other men in ordinary business may use in the advancement of their interests.

§ 41. State control not socialism.

Regulation to the extent here proposed does not mean socialism. This programme proposed such supervision of those businesses which have become public in their character as the situation demands; but it leaves the management of these concerns in the hands of their owners. Belief in State control of public utilities does not lead one to socialism; indeed, it saves one from socialism if truly understood. It is only in those few businesses where the conditions are monopolistic that dangerous power over their public has been attained by those who have the control. In most businesses the virtual competition which prevails puts the distributors at the mercy of their public. In current opinion the recognition of this distinction is manifest. The demand is for freer trade where competition prevails and stricter regulation where monopoly is found. In this time of peril to our industrial organization faith in our common law may show the way out. It cannot be that this law has guided our destinies from age to age through the countless dangers of society, only to fail us now.

CHAPTER II

STATUTORY REGULATION

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§ 50. Provisions of the Act.

The history of the course and progress of the action of the powers of Congress over commerce through the instrumentality of the Commission is written most briefly in the preamble at the head of the pamphlet containing the Act as amended, in the form in which it is now published by the Government Printing Office: "An Act to Regulate Commerce, approved February 4, 1887, as amended by an act approved March 2, 1889 (25 Statutes at Large, 855), by an act approved February 10, 1891 (26 Statutes at Large, 743), by an act approved February 8, 1895 (28 Statutes at Large, 643), by an act approved June 29, 1906 (34 Statutes at Large, 584), by a joint resolution approved June 30, 1906 (34 Statutes at Large, 838), by an act approved April 13, 1908 (35 Stat-

utes at Large, 60), by an act approved February 25, 1909 (35 Statutes at Large, 648), by an act approved June 18, 1910 (36 Statutes at Large, 539), by an act approved August 24, 1912 (37 Statutes at Large, 566), and by an act approved March 1, 1913 (37 Statutes at Large, 701)."

§ 51. Development of legislative control.

At the time of the beginning of the railroads every inducement was held out by the authorities of the State to those who would devote their capital to construction of these highways. In the early charters the legislatures not only often permitted profits which to-day would seem incredible, but gave exclusive franchises to protect the proprietors in getting the returns expected. After some experience with this policy, however, the legislatures began to grow cautious about granting exclusive rights for railroad construction; for it was felt in accordance with the theory of political economy then in vogue that competition would protect the public in all contingencies. This policy of *laissez faire* had hardly been developed when it was discovered that not only did unrestricted railroad building produce wastes costly to all concerned, but that the inevitable end of all such competition was a combination of some sort, which would almost inevitably result in higher rates. There followed a period of legislative control by direct action, rates being drastically reduced by popular clamor; but it turned out that much of this legislation was so ill advised as to practically bring the business of transportation to a standstill. Not until what may be called our own time has it been discovered that although control was necessary it could be better exercised by commissions given jurisdiction to deal with particular problems upon general principles enounced by the legislature. Only recently, therefore, has it generally been appreciated that an administrative body with its elasticity of procedure can do more to protect the public than any judicial tribunal with its inherent limitation to private litigation.

Topic A. Course of Legislation in England

§ 52. Carriers' liability before 1830.

The practice of the carriers of escaping full liability for goods carried became established at a very early date. The hint for this was given by Lord Coke in his report of Southcote's case.⁷ In a note to that case he pointed out the desirability of bailees' making a special acceptance of goods to hold as their own in order to escape the absolute liability which, as he believed, all bailees underwent. His view as to the absolute liability of all bailees was soon modified by the courts, but carriers continued under this liability, and indeed the stringent nature of their obligation was increased by the decision of the Court of the King's Bench in the case of Forward v. Pittard.⁸ In order to escape this excessive obligation, carriers came more and more to limit their liability by special acceptance. This was usually effected by the giving of notice to shippers that the carrier would not be responsible under certain circumstances, or to the full extent of the value of the goods carried. These notices were usually posted in the shipping office, and were often contained in advertisements in newspapers. The courts allowed the practice and permitted the carriers thus to limit their liability. Eventually the carriers attempted so great a limitation of their liability that shippers were really left without protection, and it became necessary to correct the evil by legislation. This was the occasion of the first English statute—The Carriers' Act of 1830.

§ 53. The Carriers' Act of 1830.

The Carriers' Act of 1830 applied to all carriers by land. Its most important provision forbade the limitation of liability by public notice, permitting, however, the carrier to make special contracts for the conveyance of goods.⁹

⁷ 4 Coke, 83b.

⁹ 11 Geo. 4 & 1 Wm. 4, c. 68.

⁸ 1 T. R. 27.

The statute further exempted the carrier from liability beyond the value of £10 unless special notice of value was given. Under this Act the giving of special notices ceased for several years, but finally the carriers again attempted to limit their liability by the giving of special notice, and the courts finally found a way of permitting the limitation of liability in this way notwithstanding the provisions of the statute. In the case of *Walker v. York and No. Midland Railway*,¹⁰ the plaintiff sued the carrier for the loss of fish he had shipped, which had been injured by the negligent delay of the carrier. The defendant had distributed to the plaintiff and others printed notices saying it would not be liable for any damage caused by delay and that no servant had any authority to alter this condition. The plaintiff claimed that he was not bound by such a notice, and that it would not protect the carrier, and, so claiming, he shipped the fish. The court advised the jury if they found that the plaintiff had received the notice to find for the defendant, unless the plaintiff had unambiguously refused to deliver the goods on the terms of the notice and the defendant had acquiesced in the refusal. Under this instruction the jury found for the defendant, and the Court of the Queen's Bench held the verdict correct.

§ 54. The Railway and Canal Traffic Act of 1854.

Partly as a result of this practice of the carriers thus legalized by the courts, Parliament passed the Railway and Canal Traffic Act of 1854.¹¹ This Act applied only to carriers by railway and canal. It forbade the limitation of liability by notice and provided that no contract limiting liability should be valid unless it was in writing and signed by the shipper. In addition to this provision it contained several other important regulations of carriage by railway. In the second section it provided that every railway and canal company should afford all reasonable

¹⁰ 2 E. & B. 750.

¹¹ 17 & 18 Vict. c. 31.

facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals and for the return of carriages, trucks, boats, and other vehicles; that no such company should give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, or subject any person, company, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; and that every such carrier having a railway or canal which formed a part of a continuous line of communication or which had a station near the station of another carrier should afford all due and reasonable facilities for receiving and forwarding all the traffic arriving by one or the other such railway without any unreasonable delay or preference or advantage, so that no obstruction might be offered to the public desirous of using such railways or canals as a continuous line of communication, and so that all reasonable accommodation might at all times be afforded to the public. In the third section it was provided that any company or person might complain of a violation of the act in any of the courts, and that the attorney-general might complain on behalf of the public; that injunctions might be issued and a penalty exacted for disobedience of such injunction.

§ 55. The Railway and Canal Commission.

In 1888 ¹² a Commission was established in Great Britain, called the Railway and Canal Commission, with both administrative and judicial duties. The Commission is composed of two appointed members (one of them experienced in railroad business) and a judge of the Superior Court, appointed in each county of the United Kingdom for the business of that county. All three commissioners sit in each case brought before the Commission; but the two appointed members may do administrative business.

¹² 51 & 52 Vict. c. 25.

To this Commission the returns are to be made; and they are to hear complaints for violation of the provisions of the Railway and Canal Traffic Act or other regulative acts, and any dispute with regard to tolls, rates and charges. They may order such reasonable facilities for traffic as the interests of the public may require. They may award damages for violations of law or for overcharge; but no damages can be awarded for overcharge where the rate charged had been properly published. The Commission may order two or more companies to make joint arrangements for traffic, and apportion the expense. Complaint may be made by municipal bodies or by trade associations. On questions of fact no appeal is allowed from an order or decision of the Commission. On any question of law the judicial member of the Commission shall decide, in case of difference of opinion; and from the decision of the Commission an appeal lies regularly to the Court of Appeal and thence to the House of Lords. On appeal the court may draw such inferences as are not inconsistent with the facts expressly found, when it is necessary to determine the question of law.

§ 56. Scope of its powers.

A classification and rate sheet must be submitted by every railway to the Board of Trade, which after hearing passes upon it; the schedule after approval is then introduced into Parliament and passed as a statute, fixing thereby the maximum rates of the railway. If the schedule of the railway is not approved, the Board of Trade may make and introduce into Parliament its own schedule. It was also provided that if a joint rate is necessary as a reasonable facility for traffic, the railways may be required to make a joint rate. Differences in charges for similar services to traders of different districts presumably constitute an undue preference, and the burden of proving them reasonable is on the railway. The Commission may so far as it thinks reasonable consider whether such

difference is necessary for the purpose of securing in the interests of the public the traffic in respect of which it is made; provided no difference shall be made in the treatment of home and foreign merchandise. The Commissioners have power to direct that no higher charge shall be made to any person for services in respect of merchandise carried over a less distance than is made to any other person for similar services in respect of the like description and quantity of merchandise carried over a greater distance on the same line of railway; but group rates are permitted. Provisions are made for posting the tariff sheet at stations; for complaints to the Board of Trade; for filing returns; and for the Board of Trade making rules and regulations.

§ 57. Increase by later amendments.

Six years later, by an amendment,¹³ it was provided that if a railway increased its rates, and a shipper filed a complaint with the Commission, the complainant (unless otherwise ordered by the Commission) need pay at the outset no more than the old rate; and the burden is on the railway to justify the increase. In 1904 it was provided further¹⁴ that the reasonable facilities required by the Railway and Canal Traffic Act shall include reasonable facilities for the junction of private sidings or private branch railways with the main line, and reasonable facilities for receiving, forwarding and delivering traffic upon and from those sidings or private branch railways. The most important legislation since that time would seem to be the Railway Companies Accounts and Returns Act of 1911.¹⁵ That Act provided most elaborately for the system of accounts to be kept by corporations under the supervision of the Commission. There are schedules annexed to the Act with the elaboration of detail characteristic of English legislation setting forth the various

¹³ 57 & 58 Vict. c. 54.

¹⁵ 1 & 2 Geo. 5, c. 34.

¹⁴ 4 Edw. 7, c. 19.

forms to be followed by the companies, both as to the accounts which they should keep and the returns which they must make.

§ 58. Influence of English legislation.

It will be noted at various points throughout this book that there has been an interchange of ideas between England and America concerning the exercise of the powers of regulation over railroads. The Interstate Commerce Act of 1887, in its substantive provisions in the earlier sections, particularly those relating to undue or unreasonable preference, or advantage in the treatment of shippers or traffic, is plainly modeled upon the Railway and Canal Traffic Act. That provision of the Hepburn Act giving the Commission power to require the connection of branch sidings with the main line had been anticipated by English legislation of a few years earlier. And the provision of the Mann Act to the effect that increases in rates could be suspended until passed upon by the commission—the burden of proof being upon the railroad to justify the advance—was also founded upon English legislation. On the other hand, the recent Act of Parliament relating to the making of reports and the keeping of accounts is related in character to provisions of the Act to Regulate Commerce of long standing.

§ 59. Authority of English decisions.

This fact, that several of the fundamental provisions of the Interstate Commerce Act have been founded upon the Railway and Canal Traffic Act, has had a consequence of importance in determining the interpretation which our courts have put upon these sections. Thus, the section of the Interstate Commerce Act, limiting the condemnation of rates described as discriminating to those charged under circumstances and conditions substantially similar, was so clearly founded upon the similar provision in the Railway and Canal Traffic Act, that the decisions of the

English courts as to the application of this proviso, which were in their reports at the time the Act to Regulate Commerce was passed, were, in accordance with the accepted canon of statutory construction, held to have been in the contemplation of the Congress when the Act was passed, to such an extent as to make these decisions governing. A late example of this same doctrine is the case where it was decided that no difference could be made between shippers who had gathered together goods of others for shipment and other shippers, such forwarders having been held long before by the English courts to have rights not to be discriminated against when interpreting the similar provisions upon which the American Act was founded.

Topic B. Regulation in the States

§ 60. The Granger rate legislation.

Between 1870 and 1880 the western States began to pass stringent statutes for the regulation of railway charges. The railways running through this section were principally organized and owned in the eastern States, and the farmers of the west had become dissatisfied with the treatment they received, believing that the roads were managed exclusively in the interest of their eastern owners. The cruder legislation at the beginning of this period provided in the statute itself maximum rates for the carriage of freight. For instance, in the constitution of 1870 the Illinois legislature was given express power to establish reasonable maximum rates by railroads for the transportation of passengers and freight on the different railroads of the State. Meanwhile other difficulties were felt by the people beside that of excessive charges. The discrimination of railroads in favor of certain shippers came to be an industrial evil, and provisions were adopted in State after State forbidding such discrimination. Among the earliest was that contained in the constitution of Pennsylvania of 1873, in which it was provided that persons

and property should be transported without undue or unreasonable discrimination in charges or in facilities.

§ 61. Railroad commissions of former times.

The regulation of charges by direct legislation was found not to be a convenient or effective method; and as early as the period during the era of the construction of the original railroads there were commissions established by the legislatures from time to time to report upon certain phases of the problems which the railroads presented. Following the period of the Granger legislation with its more or less unfortunate results the States not long thereafter began establishing permanently commissions, which were given in several States the power to fix rates; and this movement for the establishment of railroad commissions eventually covered the entire country. Almost every State had a transportation commission, although the powers intrusted to it differed widely in the different States. The effectiveness of these commissions depended to a great extent upon the skill and ability with which they are administered, and the confidence felt in their decisions. The original commissions were established simply to investigate conditions and report to the legislature. Thus, until recently, the Massachusetts Commission had fundamentally no greater power than to make recommendations to the railroads, which if disobeyed, were more or less certain to result in specific action by the legislature. On the other hand, the Commissions of later origin, such as the Texas Commission, were given by the legislature not only the power to revise the rates established by the railroads, but to fix rates on its own initiative.

§ 62. Additions to their powers.

Later, more extensive powers over railroads were given to the various State commissions. It was realized that the attempt to regulate the railroads by laws passed from

time to time had broken down. Such legislative control was sporadic in its character, and scattering in its effect. It was so far without principles that it was continually being set aside by the courts, and yet it paid little attention to particular situations requiring special treatment. Altogether, it was at last appreciated that the problem of the regulation of railroads is more administrative than it is legislative. It is comparatively easy to say in general, from year to year, what in general is right to be done, but it is impossible to decree from day to day, just what in particular should be the service rendered. For a full generation now, it has generally agreed that the authority to give orders in particular cases, with power of the State behind it, should be given to the commission charged with supervision over the railroads. In States such as Mississippi, this power was early established, to be followed in the other States as they were willing to face the problem. In these States it will be noted the legislature went no further in delegation of its power, than to give the commission power to apply the principles laid down to particular cases, but in some States the legislature has gone to the extent of virtually abdicating its functions by giving to the commission power to lay down general obligations governing all carriers. A commission which has the power given to it as in Missouri of promulgating schedules to which all railroads must conform, is having powers given it which it seems should not properly be conferred.

§ 63. The modern public service commissions.

The powers of these railroad commissions of the earlier time had by 1900 gradually been extended over facilities connected with transportation, warehouses for example where the elevation of grain is a matter of importance. Then came a period, soon after 1900, when the importance of the transmission of intelligence by wire had become of such moment that jurisdiction over telephone companies was added to the powers of almost all of the railroad

commissions. Only a little later, it was appreciated that the regulation of the municipal utilities such as gas works and electric plants could not be accomplished effectively by the crude methods of limitations in charters, long abandoned in the matter of transportation services, or by municipal ordinances passed at sporadic intervals and often set aside by the courts as beyond the power of the city. In some few States this need was met by the establishment of special commissions to deal with these new services. But almost simultaneously all over the United States, beginning with New York about 1906, legislation was passed establishing in place of the existing commissions new commissions with power over all the public services of consequence to the Commonwealth. The Wisconsin commission was at about the same time given even more extensive powers over the public services within its borders. There can be no doubt that this movement to put all the public service companies under one State commission is sweeping the country. And indeed such concentration of the regulating authority seems plainly to be the desirable thing, save where particular circumstances may make it for the time impracticable.

§ 64. The spread of the movement.

Nothing is more significant in the history of American institutions of late years than the spread of this movement. The concentration of the regulation of all the utilities which are public in character has become a policy to which all parties have given their support. During the past few years there has not been a time when the establishment of a public service commission, with general jurisdiction over all the utilities, has not been written in the annals of the legislation of several States. The New England States, with their conservative traditions, have acted one by one until there is a public service commission now in every State. The middle States of the tier which crosses from the Atlantic to the Mississippi,

in place of their railroad commission have created general public utility commissions. There is now a commission with more or less extended powers over businesses affected with a public interest in practically every State in the Union; and the railroads, it is needless to say, are subject to the control of the commission in every case. The impelling forces back of this movement which has thus swept the country is the fundamental unity. It is recognized, at last, that the law governing the public utilities is one and the same, and that, therefore, there should be one body versed in it all with full powers over the whole situation.

§ 65. Extent of their supervision.

It has been assumed throughout the country for so long that these public utilities of every sort ought not to be left unregulated in private hands that argument to that effect would be superfluous. Indeed, it is now appreciated that the only alternative to an impetuous movement toward public ownership is real success in effective regulation of private ownership. The whole movement toward commission regulation rests upon the public conviction that the earlier methods of regulation attempted through court processes has proved upon the whole ineffective, and that specific legislation has been in most instances unintelligent. As a practical matter the justification of commission activity and supervision, as against statutory control enforced by the courts, is that there is thereby established a specialized body, expert in the particular work which it has to perform. The modern statutes establishing these bodies recognize the commission as the organ of the State both for protecting the rights of the utilities in the performance of their functions and for compelling the utilities to render in proper manner all of their public duties. Chief among the powers essential to such a commission is the right to obtain full information upon every point affecting the operatives of the companies subject to its jurisdiction.

§ 66. Regulation of Rates.

The power is generally given to the commissions in the States to determine and establish after notice and hearing just and reasonable rates and the classifications and regulations appertaining thereto. Experience seems to have also made it plain that the protection of all concerned requires the further provision that the rates and classifications shall be filed with the commission before going into effect, thereby becoming the only legal rates which can be charged anyone. This has the consequence of making the charging of any different rate than that which has duly been scheduled conclusively illegal as discrimination, without any possibility of urging extenuating reasons for making a difference in rates. It is common to provide that rates may not be advanced without the permission of the commission having first been obtained. Indeed, in the more thorough-going States the power not merely to suspend advances in rates but to prevent the lowering of rates unduly is given to the commission—to fix the minimum in fairness to all concerned as well as the maximum of charge for protection of the public has been given.

§ 67. Adequacy of service.

It is only in recent years that it has been appreciated that the power to compel adequate service is if anything of more importance to the community than the keeping of rates to a reasonable level. By the provisions of the modern statutes, the commission is given full power for determining not merely adequacy and safety of the service but also a large influence in determining its character and extent, so far as this may be done consistently with the constitutional rights of the companies concerned. The power of the commission to order both repairs and additions to the plant and increase and extension of facilities is usually set forth in general language; but such matters as those with which the courts had hesitated to deal, such as the opening of stations and the making of switch

connections, are usually specifically mentioned. That such things as train service and freight facilities can better be handled by a commission with discretion than by the passing of special statutes or codes is clear. Indeed, the former attempt to bring about proper service by judicial process brought at private expense to enforce statutory provisions proved a dismal failure.

§ 68. Keeping of accounts.

The modern statutes call for uniform accounts by public utilities kept in a way prescribed by the commission with the right of the commission at discretion to classify utilities for this purpose. The power to prescribe uniform accounting would of course be useless without the provision made for sufficient inquisitorial powers to see that all orders of the commission are obeyed. It is also plain that the orders of the commission could be evaded if companies were not forbidden to keep one set of books for use before commissions and another set for their own information. In the latest statutes certain matters of accountancy, such as depreciation reserves, the fixing of the rate of depreciation for utilities of various classes is properly left to the discretion of the commission. It is plain that for the protection of the public the utilities must be required to set aside sufficient funds to keep the plant in a state of operating efficiency and the investment at a fixed level. It should be added that all this has its effect in determining the rate of dividend which these corporations may properly pay.

§ 69. Issue of securities.

In a great many States the commissions have been given power to pass upon the securities which the corporations subject to their jurisdiction are proposing to issue. The object of regulating capitalization is to see that all capitalization upon which the public is expected to pay a return represents money actually used in serving the public, and to make certain that no part of such securities

represents improper expenditure for what are not fairly capital purposes. Furthermore, if these provisions are to be effective the Commission must see that the proceeds of capital issues are in fact spent for the objects for which the issue was made and for no other. Ample leeway is usually given the companies to meet temporary needs and emergencies by unregulated and unfunded issues of short time obligations, which will not therefore become a permanent burden upon the public. It is equally necessary that consolidations of corporations shall be passed upon by the Commission, together with whatever new securities the combination involves. This is peculiarly necessary to prevent the capitalization of franchise values, which would prevent any effective regulation of rates based upon confining the company to a fair return upon the capital actually invested.

Topic C. The Establishment of the Federal Commission

§ 70. The Interstate Commerce Act of 1887.

The power given to Congress by the Constitution over commerce between the States was not taken advantage of until the year 1887, when the Interstate Commerce Act was passed. This act was founded to a considerable extent on the English Railway and Canal Traffic Act, although many of its provisions were influenced by prior State legislation. In the original Act the Interstate Commerce Commission was created and its organization defined. Railroads were forbidden to charge more than just and reasonable rates, or to discriminate between persons or places. The Commission was given the power to investigate alleged violations of the Act and to make orders thereon, and power was given to the courts to act in support of such orders. One or two particular abuses were directly forbidden. Thus it was forbidden to charge more for a shorter than for a longer haul in the same direction and over the same route under substantially similar conditions, and the practice of giving rebates or free car-

riage was forbidden. And it was provided that in dealing with connecting carriers no preferences or priorities in facilities or service should be given to one over another.

§ 71. Scope of the original provisions.

In running through the Act as it originally stood there are certain points which will be worth noting in view of later developments. The jurisdiction of the Commission extended generally only to carriers wholly by railroad engaged in interstate and foreign commerce; it did not cover water carriers, unless operated under common control with railroad carriers. Generally speaking, there was no idea of giving anything but supervisory power over the railroads; the Commission was primarily established by the Congress as an investigating body. It did have powers, however, in addition to conducting general investigations, to hear particular complaints; but in respect to such complaints, it had no powers of its own to grant relief. The most that the Commission could do was to make findings on such complaints, and its report thereupon could be used as *prima facie* evidence in proceedings in the courts based upon the wrongs alleged. However, the railroads in these subsequent proceedings, which were virtually regarded as *de novo*, put in any evidence they had, and it was more or less of a scandal that the railroads showed very generally a disposition in important cases to withhold much of their evidence from the Commission and produce it before the courts, with the result that the courts would very frequently come to a different conclusion from that which the Commission had announced.

§ 72. Immediate Amendments found necessary.

It was found from the very outset, that the Commission had not been given in this legislation the equipment to carry out the objects for which it was created, moderate as these were in their purpose. The Commission was particularly charged with seeing whether rates were reason-

able in themselves, and whether rebates were being given; but the carriers were not required to file their schedules of rates so that it could be known how matters stood, and what was being done. Moreover, although the duty to investigate conditions and report thereon was imposed upon the Commission, its powers to call witnesses and elicit testimony were by no means sufficient for the purpose. The Amendments of 1889 and 1891 were, therefore, necessary to clear things up in these two respects, if the Commission was to have any real power to accomplish the objects for which it was created.

§ 73. The Elkins Act of 1903.

In 1903 the so-called Elkins Act was passed to perfect the Act. In the first section carriers in interstate commerce are made criminally responsible for violations of the Act. In the second section provision is made for bringing into any proceeding before the Commission all carriers or other persons interested in the inquiry. In the third section jurisdiction is given to the courts sitting in equity, at the request of the Commission, to inquire into and enjoin any infraction of the provisions of the Act. These suits shall be prosecuted by the District Attorneys under order of the Attorney-General, and shall not preclude suit by private persons. And provision is made for speedy trial by expediting such suits.

§ 74. The long and short haul clause.

It seems to have been undoubtedly the intention of the framers of section 4, the long and short haul clause, to forbid absolutely the practice of charging more for a shorter haul, unless upon application to the Commission express permission so to charge was given. The section, however, was a matter of contention between the two houses of Congress, and as it was finally passed the qualifying phrase "under substantially similar circumstances and conditions" was inserted, without probably any very clear

belief that the meaning of the section was thereby fundamentally altered. At first the railroads acted upon the supposition that express permission of the Commission must be obtained according to the proviso in the section, if a greater charge was to be made for the shorter haul, and this seemed to be the view at first taken by the courts. The philosophy of the Act was that competition would reduce the rates to a fair amount at all competitive points, and that the fourth section would then keep the rates at non-competitive points down to the level of the competitive rates. The courts, however, finally decided, in view of the limitation of the section to cases where the conditions were substantially similar, that competition with other carriers would justify a lower rate for the longer haul, and as practically all cases of the sort before the passage of the Act had been due to the competition of other carriers, this decision in effect nullified the whole section until its force was restored in 1910 by Amendment to the Act.

§ 75. Limited jurisdiction over rates.

From the outset of its history the Commission claimed that under the Act it had the power not merely to forbid an unreasonable rate, but also to indicate to any railroad what it would regard as a reasonable rate for any particular service, and that then the railroad disregarding such recommendation would be subject to the action of the courts. The lower federal courts, however, from the beginning denied this power to the Commission. The question did not reach the Supreme Court of the United States for ten years, but finally in the Cincinnati, New Orleans and Texas Pacific Railway case the issue was fairly presented; and the Supreme Court of the United States decided that the Commission had no power to fix rates. After that time the Commission under certain circumstances advised a railroad that in its opinion a reasonable rate would be no greater than a sum named; but no attempt was made to go further than this in fixing rates,

until in 1906 this power was given it by amendment to the Act.

§ 76. Lack of power over through rates.

The practice of carriers to make through traffic arrangements with some one connecting line, and to throw all business into the hands of that line, notwithstanding the wishes of the shipper and without regard to his interests, caused dissatisfaction from the outset. It is true that in case such an arrangement was made the through rate would be posted; but if the tariff sheet did not state the route the shipper was deprived of a chance to discover and ship by a cheaper route, or one more agreeable to him for any reason. Furthermore, the connecting carriers sometimes refused to recognize the joint rates and collected their entire local charges. The Commission early ordered that published joint tariffs should indicate the route, and that the connecting carriers should file a consent to the rate. But the carriers refused to abide by this order; and upon a suit for enforcing it the Supreme Court finally held that the carrier might publish a through tariff of rates, reserving the right to route as it pleased. All this has been changed by later amendments to the Act, to be discussed subsequently in this chapter.

§ 77. The occasion for radical changes.

The attitude of the courts toward the Interstate Commerce Act caused considerable dissatisfaction, especially in those parts of the country where the great bulk of freight originates, and the desire for further regulation culminated in the passage of the Rate Regulation Act of 1906. This action of Congress had been foreshadowed by a very considerable body of similar legislation in the States just previously. It was characteristic of this legislation that it confers on the railway commissions the power of fixing a maximum rate; and the giving of such power to the Interstate Commerce Commission was in fact the

chief object of those who secured the passage of the Railroad Rate Act. The decisions of the Supreme Court which had given most dissatisfaction were the decision denying the Commission the power to fix rates and that permitting the carrier to charge a less sum for a longer haul. In addition to this, certain omissions in the original Act were found to work badly, in view of the railroad practices. Most of these defects had been remedied by legislation in England. It was believed by a large portion of the shippers that railway rates were in many instances too high, and that favoritism through rebates and other forms of discrimination were indulged in by various methods by the carriers.

Topic D. The Strengthening of the Commission

§ 78. The Hepburn Act of 1906.

The act of 1906, was in the form of an amendment to the original Interstate Commerce Act; and its object was to perfect that Act by an extension of its scope. It increased the number of commissioners from five to seven; and their salaries from \$7500 to \$10,000. It included in the provisions of the Act express and sleeping-car companies and pipe lines for the transportation of oil or any other commodity except water and natural or artificial gas. It enumerated at great length the persons to whom free passes may be issued (the original Act having named typical classes only), and made it a crime to issue or to use a pass contrary to the provisions of the Act. It made the penalties for a violation of the Act more severe, and provided more carefully for the institution of prosecutions for violation of the Act.

§ 79. Effect of these Amendments.

The legislation of this period fundamentally changed the character of the Commission, so much so that it is spoken of in Washington circles as the New Commission when contrasting it with the Old Commission before 1906.

Under the old law, the Commission was primarily an investigating body, aiding the legislative branch in showing it the way. Its powers were hardly more than administrative, being confined largely to supervision by inquiry into the course the carriers were taking, rather than any regulation of their conduct by order. But from now on the Commission may fairly be said to have combined in its constitution quasi-judicial functions along with its administrative duties. It henceforth not merely declares matters of which complaint has been made so improper that relief should be granted; but it fixes for the future the standard of propriety to be observed. Since this time it has become a regulating commission with the fundamental powers characteristic of such bodies. It remained only to develop those powers still further by subsequent legislation.

§ 80. Occasion for the Act.

The occasion for the new Act was thus stated by the Congressional Committee that reported the bill: "It has been believed by a large portion of the shippers that railway rates were in many instances too high, and that favoritism through rebates and other forms of discrimination were indulged in by various methods by the carriers. The ingenuity of some of the carriers and shippers has resulted in avoiding the provisions of that Act through the use of joint tariffs, involving, in some instances, a railroad and a mere switch owned by a shipper; through arrangements whereby excessive mileage was given to the shipper of products who owned his own cars; through the use of refrigerator cars; through the permission given to independent corporations to render some service incident to the shipment, as the furnishing of ice in the bunkers of the car; by what is known as the 'midnight tariff,' a method involving an arrangement with a shipper to assemble his freights, have them ready for shipment at a particular date, whereupon the carrier would give the necessary three days' notice of a reduction in the rate. Compet-

ing carriers and shippers would know nothing about this arrangement. The freight would be shipped at the new lower rate, and then there would be a restoration of the old rate. The law of to-day would be fairly satisfactory to all shippers if the spirit of fairness required by it had controlled the conduct of the carriers, and the necessity for the proposed legislation is the result of and is made necessary by the misconduct of parties who are now most clamorous against additional restraint. If the carriers had in good faith accepted existing statutes and obeyed them there would have been no necessity for increasing the powers of the Commission or the enactment of new coercive measures."

§ 81. Installation of private switches.

Several new provisions in this 1906 legislation were directed against certain abuses which had fostered monopolies. The original Act had left it possible for a railroad to serve a favored shipper by making connection with his private switch and refusing a similar connection to another shipper. By a provision in section 1 of the Hepburn Act, it was provided that any common carrier subject to the provisions of the Act upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. In case the carrier refused upon application, to make or operate such connection, an appeal for the issuance of an order was allowed to the Commission for any shipper aggrieved by a refusal;

it was not until the Mann Act, after the omission had been pointed out by the Supreme Court, that the owner of the lateral line was also given the right to go to the Commission for an order for installation of a switch.

§ 82. Regulation of private facilities.

One of the most galling monopolies established by action of the railroads and permissible under the original act, was that of the private car. For example, a few great corporations, by contract with the railroads, established a monopoly of the supply of refrigerator cars for the carriage of perishable fruit; and a similar, and hardly less far-reaching monopoly was created in tank cars. The evil of the private car line was felt in two directions: first, the charge to ordinary shippers using the cars was increased by monopolistic rates; second, the charge to the owners of the cars was greatly lessened by rebates for the use of the cars. In the first section of the Hepburn Act it was provided that the term "transportation" shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish just and reasonable rates applicable thereto. In a later section it was further provided that if the owner of property transported, directly or indirectly, render any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the service so rendered

or for the use of the instrumentality so furnished, and fix the same by appropriate order.

§ 83. Power to fix maximum rates.

The most important feature of the 1906 Amendment was that giving the Commission the power to fix maximum rates. The fixing of maximum rates already had not been uncommon in the States; and in other countries it had been usual, if not universal. In England, maximum rates were fixed, not by the Railway and Canal Commission, but by the Board of Trade, one of the executive departments of the government, after due hearing; and the rates thus fixed were enacted in the form of statute by Parliament, after an opportunity for hearing before a committee. The provisions of the Hepburn Act which are still in force were that upon complaint the Commission, after hearing, shall determine a reasonable maximum rate, which shall take effect at such time after thirty days as may be fixed by the Commission, and shall continue in force not more than two years, unless suspended or set aside by the Commission or the courts. The carrier aggrieved may appeal to the courts for an injunction against the rate so fixed; but no injunction or interlocutory order shall be issued without a hearing after five days' notice to the Commission. An appeal from the Circuit Court lies directly to the Supreme Court, and preference is given to such cases. No change in rates, even within this maximum, shall be made by the carriers until after thirty days' notice, unless this period is shortened by the Commission.

§ 84. Ordering through routes and rates.

The English acts gave to the Railway and Canal Commission power to establish through routes and to Parliament, on recommendation of the Board of Trade, power to establish through rates whenever this course was required, in order to create reasonable facilities; but this power was not included in the original Interstate Commerce Act.

The Interstate Commerce Commission had often recommended that the power be granted, and this was done in the Hepburn Act. In section 1 of the new Act, it was made the duty of every carrier subject to the provisions of the Act to establish through routes and just and reasonable rates applicable thereto. In section 15 of the Act it was provided that the Commission may, after hearing on a complaint, establish through routes and joint rates as the maximum to be charged and prescribe the division of such rates, and the terms and conditions under which such through routes shall be operated, when that may be necessary to give effect to any provision of the Act, and the carriers complained of have refused or neglected to voluntarily establish such through routes and joint rates, provided no reasonable or satisfactory through route existed.

§ 85. The problem of the industrial railways.

Another matter, which was even at that time being considered as leading to abuses which ought to be brought within the power of the Commission to remedy, was the matter of the industrial railways. These are short lines of railway, owned in some connection with the industries which they were primarily designed to serve; either the corporation owning the industry owns the railroad, or its ownership is vested in those who are prominent in it. These railroads are usually operated in pretense at least as common carriers, however improbable it may be that anyone else will want to ship over them. And posing as connecting carriers they have always been accustomed to see that they got a good division as originating carriers out of the joint rate. But if this tap line really is a common carrier although the public resorting to it is small, there would seem to be no way to prevent this; but even so the Commission could be given power to pass upon the propriety of the division. If, however, it is really a plant facility it should not have any such standing whatsoever to

get what would virtually be a rebate, if it went beyond a switching allowance, duly sanctioned by the Commission and made to all shippers furnishing such facilities. It will be seen, therefore, that by getting powers over divisions and allowances the Commission in 1906 got a measure of control over the situation as a whole.

Topic E. The Elaboration of its Powers

§ 86. The Mann Act of 1910.

By the Mann Act of 1910 a number of amendments of great importance were made to the Act to Regulate Commerce, whereby the jurisdiction of the Commission was extended into new fields and its powers over the companies subject to its jurisdiction strengthened. Telephone and telegraph companies, whether wire or wireless, were put under the power of the Commission so far as Congress could constitutionally extend jurisdiction. The fourth section of the Act relating to the long and short haul was changed so as to put an end to the controversy. The power over through rates was made positive, the whole matter belonging to the Commission subject to certain provisos. The power of the Commission over rates and schedules was made more extensive. In particular the Commission was given power to suspend advances in rates pending investigation thereof. There were other amendments of less importance, such as change in the requirements as to annual reports and further powers over accounts consequent thereon.

§ 87. The new long and short haul clause.

The controversy which began a generation ago as to the true meaning of the long and short haul clause was finally settled by this legislation by cutting out the clause concerning similar circumstances and conditions, by virtue of which the courts had practically nullified the statute, and unequivocally making it unlawful for any common carrier subject to the provisions of this Act to charge or

receive any greater compensation in the aggregate for transportation for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance. The Commission was confirmed in its jurisdiction to authorize carriers to make charges which would otherwise be in violation of this section, by acting upon applications from time to time and thereupon determining the extent to which a designated common carrier might be relieved from the operation of the section. It was provided as a temporary measure that rates lawfully in effect at the time of the passage of the Act might be kept in force provided applications under the section covering them had been duly filed; and this situation has not altogether been cleared up at present.

§ 88. Establishment of through routes.

The limitations which the Supreme Court had found in the power of the Commission, to establish through routes only when no satisfactory through route existed as the courts themselves viewed the evidence, was eliminated by making the clause read so that the Commission, in its own discretion as to the necessity therefor, might act at any time in this matter after hearing, whenever the carriers had failed to establish joint rates themselves. However, a railroad was protected against being short-hauled by an explicit clause to the effect that, in establishing such through route, the Commission shall not require any company, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through routes, unless to do so would make such through route unreasonably long as compared with another practicable through route which could otherwise be established.

§ 89. Suspension of rate advances.

Perhaps the most consequential change in the Act was the provision giving the Commission special powers in the case of new schedules filed with it. The Commission may thereupon, either upon complaint or upon its own initiative, without complaint at once and, if it so orders, without answer being filed by the interested carriers provided they have had reasonable notice, enter upon a hearing concerning the propriety of the change proposed. Pending hearing and decision thereon, the Commission may by simply delivering to the carriers the reasons for taking action suspend the operation of such schedule for four months beyond the time when it would otherwise go into effect; and if the hearing is not completed the time may be further extended for a period not exceeding six months. After full hearing, whether completed before or after the rate goes into effect, the Commission may make such order as lies within its jurisdiction over rates. At any hearing involving a rate sought to be increased after the passage of the Act of 1910 the burden of proof to show that the increased rate or proposed increased rates is just and reasonable shall be upon the common carriers, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it, and decide the same as speedily as possible.

§ 90. The Hadley Commission.

Furthermore the Mann Act provided for the appointment by the President of a special commission to investigate questions pertaining to the issuance of stocks and bonds by carriers subject to the Act, and the power of Congress to regulate the same. The Commission was authorized to employ experts and assistants, and the several departments and bureaus of the Government were to furnish it officials and employees specially detailed to this work. The Commission as constituted by the President, came to be known as the Hadley Commission

by reason of the prominence in it of President Hadley of Yale University. It made a report setting forth the practices of the American States in regard to regulating the issuance of securities; and in general advised against any legislation by Congress involving regulation by its authority.

§ 91. The Commerce Court.

The legislation of 1910 also provided for the establishment of a commerce court, composed of five circuit judges, appointed thereto, and thereafter assigned for that service. This court was to have the jurisdiction formerly possessed by the circuit courts over cases for the enforcement of any order of the Commission except for the payment of money, and as thus limited it had no functions over forfeitures and penalties. It was thought that there would be an advantage in securing the prompt decision of the fundamental questions of traffic law, but in the actual result the decisions seemed to point out in a way which had not perhaps been anticipated the jurisdictional limitations upon Commission action, both constitutional and statutory. That these points, generally speaking, were well taken, would undoubtedly be the opinion of most lawyers; but the policy of the court in holding the Commission to the limits of the law was hardly popular. At all events, by the Urgent Deficiency Act of 1913, the commerce court was abolished, and the jurisdiction of the several courts restored to what it was before.

§ 92. The Panama Act.

Included in the Panama Act of 1912 were various clauses of great importance in extending the power of the Commission over transportation by water, although the commerce moving wholly by water is still excluded from the jurisdiction of the Commission. The sections referred to provide that where property is being transported from point to point in the United States by rail and water the Commission shall have jurisdiction: (a) To establish physi-

cal connection by spur tracks between the lines of a rail carrier and the docks of a water carrier, whenever such connection is practicable and the amount of business offered is sufficient to justify it; (b) to establish through routes and maximum joint rates between and over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced; (c) to establish maximum proportional rates by rail to and from the ports to which the traffic is brought, or from which it is taken by the water carrier, and to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates shall apply; (d) if any rail carrier subject to the Act to Regulate Commerce enters into arrangements with any water carrier operating from a port in the United States to a foreign country, for the handling of through business between interior points of the United States and such foreign country, the Commission may require such railway to enter into similar arrangements with any or all other lines of steamships operating from said port to the same foreign country.

§ 93. The Valuation Act.

By another amendment of the Interstate Commerce Act of 1913, the Commission was directed to proceed forthwith to investigate and ascertain the value of all the property owned or used by every common carrier subject to its jurisdiction. Every fact of any sort relating to the properties of the carrier at any time in their existence which might be pertinent is demanded specially; not only the original cost, as nearly as that can be ascertained, but the present value as exactly as that can be appraised. Nor is Congress contented with this determination of actual conditions, past and present, so far as by human assiduity and ingenuity the past can be unravelled and the present be estimated. The Commission is asked further what it would cost to reproduce these properties new at the pres-

ent time, and what figure would be set upon them if from the estimated cost of reproduction were deducted their indicated depreciation in their present state. And then follow other questions as to past operations and present conditions of still more difficulty, designed to meet problems of valuation which are bothering even those most conversant with these matters. The Commission is not merely asked to collect all this data and make all these appraisals as to things tangible and intangible, actual and hypothetical. It is told to classify all these things and make comparisons between them, and to state the reasons of these differences and the basis of these values.

Topic F. Recent Decisions Defining Jurisdiction

§ 94. The Abilene Oil case.

During the past few years there have been a succession of cases fixing limitations upon the jurisdiction of the Commission within the powers now conferred upon it by the Act. Of course, these leading cases receive appropriate treatment in later chapters in their proper place; but there are a few of them which have such a part in the history of the development of the functions intrusted by Congress to the Commission as to make it fitting that they should receive mention here. It is now realized that in regard to the whole field of the determination of the reasonableness of the rates the provisions which Congress has made show plainly enough that the jurisdiction of the Commission is designed to be exclusive, and the end of trial of such matters before any other tribunal,—otherwise than by recourse to the proper court, to set the order of the Commission aside as in excess of jurisdiction. How far the courts will go in working out such intent is seen in the leading case of *Texas & Pacific Railway v. Abilene Cotton Oil Company*,¹⁶ where it was held that, as to wrongs done shippers for which redress was provided by the processes of the Commission, no suit could be brought

¹⁶ 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. 350 (1907).

elsewhere in any court. If a shipper is ready to prove that the rate charged him was outrageously high he can no longer, as formerly, litigate the matter in the courts, and show that the established rate is unreasonable. He must go to the Commission to get the scheduled rate set aside, and reparation awarded him for the extortion. Indeed, the theory is that the scheduled rate is the only legal rate until thus altered; and this has had the startling result of compelling shippers to pay the scheduled rate, even when a lower rate was quoted them. Whatever is duly confided to the jurisdiction of the Commission is thus automatically withdrawn from the cognizance of the courts as an original question.

§ 95. The Proctor Gamble case.

It has only recently been pointed out that there is no appeal when the Commission dismisses by an adverse decision a shipper who is complaining that rates charged him are more than he should be obliged to pay. To be sure, where a carrier is subjected to regulation to the extent of being obliged to serve at less than a fair return, it is being subjected to unconstitutional deprivations. But unlike the carrier who must serve all at the rate established by law, the shipper is not obliged to ship unless he wishes, and his property is not therefore taken from him by compulsory process in the view of the law. This doctrine that, whereas a carrier has constitutional rights to attack the decision of a commission, the shipper only has such statutory rights as may be provided, is shown in the recent case of *Proctor Gamble & Co. v. United States*.¹⁷ That case held that, as the system of procedure provided by the Interstate Commerce Act contained no provision for appeal by a party whose complaint had been dismissed by the Interstate Commerce Commission, he had no right whatever, as he had no basis for recourse to the courts upon the ground that he could not earn a livelihood ship-

¹⁷ 225 U. S. 282, 56 L. ed. 1478, 32 Sup. Ct. 761.

ping at the rates upon the existing basis. This decision is quite consistent with the theory of administration underlying our system at present. If the body duly charged with seeing that only such rates are charged as are reasonable decides that the interests of the public are protected, why should anybody have any standing to go to the courts about it any more than for any other difference of opinion as to matters of government?

§ 96. The Willamette Valley case.

The significance of the limitations in the Act as amended in 1906 was probably not brought to the attention of the country until the case of the *Southern Pacific v. Interstate Commerce Commission*.¹⁸ The Commission, as it appeared in that case, had come to the rescue of the lumber industry of the Willamette valley, which was threatened by advances in rates which had been put into effect shortly before. At all events, it had after due proceedings fixed lower rates for the future in place of the new rates, apparently upon the ground that it would be a wise policy to keep open the markets which had thus been closed. The earlier rates undoubtedly had thus created markets upon which the shippers had come to rely; but, as the Supreme Court pointed out, all these arguments ignored the provisions of the Act. In the absence of a finding that the advanced rates which carriers had put in effect were unreasonable, the Commission had no jurisdiction to go further; and this was not made out by showing that public interests would be promoted by lower rates. Such arguments might sometimes avail carriers in explaining differentials; but they could not justify the Commissions in ordering changes.

§ 97. The Lemon Rates case.

Thus stands at present the jurisdiction of the Interstate Commerce Commission over rates. Under the Act the

¹⁸ 219 U. S. 433, 56 L. ed. 308, 31 Sup. Ct. 288.

carrier retains the primary right to make rates; but if, after hearing, they are shown to be unreasonable, the Commission may set them aside and fix for the future that rate which it regards as reasonable. Therefore, unless there is evidence before the Commission to show that the rates attacked were unreasonable, there is no jurisdiction to proceed further. What is a reasonable rate is a matter as to which our modern law has some ideas, although they are by no means as clear as they soon will be with the development now going on so rapidly in this branch of the law. We are at a point where progress can at least be made in this matter, with the famous case of *Interstate Commerce Commission v. Atchison, Topeka & Santa Fe Railway* at last brought to a termination by the late affirmation of the Supreme Court.¹⁹ This matter of the Lemon rates from the Pacific coast has been going back and forth between the Commission and the courts for some time. First, the Commission reduced the rates for reasons in last analysis more economic than legal; and this order the Commerce Court set aside, as the existing rate had not been sufficiently shown to be unreasonable in the sense of the law. Then the Commission took further testimony, making at least a showing sufficient to justify it in declaring the existing rates unreasonable, and substituted new rates; and the federal court then held in effect that whatever motive might be behind this action there was reason enough apparent in the record for the course it had pursued. And indeed this final action is good administration, quite in accordance with the distinction between the motives for taking action at a particular time and the basis upon which that action is taken.

§ 98. The Baltimore & Ohio case.

Moreover, a carrier does not have the hearing which the Act makes prerequisite unless he knows what evidence is offered or considered, and is given opportunity to ex-

¹⁹ 231 U. S. 736, 34 Sup. Ct. 316.

plain and refute it. This is not merely a matter of proper construction of the Act, it is a right which comes from the Constitution itself. This argument was brought out fully in the Supreme Court recently where the contention was made that the findings and orders of the Commission under section 15 might be originally supported and subsequently defended by information which the Commission had gathered under section 12 for general purposes. But the Supreme Court would have none of this where the rights of parties were involved. When the point was raised apparently for the first time in *United States v. Baltimore & Ohio Southwestern Railroad*,²⁰ there was no question about the attitude of the Supreme Court. The Supreme Court is now plainly insistent that all parties before the Commission in any proceedings directed against them must be fully apprised of the evidence submitted or to be considered and must be given opportunity to cross-examine witnesses and to inspect documents and to offer evidence in explanation and rebuttal. In no other way consistently with what we consider the course of the administration of justice can a party maintain its rights or make out its defense. Moreover, as the Supreme Court has keenly appreciated, in no other way can the courts inquire as to the existence of evidence upon which the finding might be based; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown but presumptively sufficient, information to support the finding.

§ 99. The Minnesota Rate case.

When we come to deal with the constitutional complications due to our federal government, too wide a field is opened for anything but reference here. But such a decision as *Simpson v. Shepard*²¹ goes far toward making

²⁰ 226 U. S. 14, 57 L. ed. 104, 33 Sup. Ct. 5.

²¹ 230 U. S. 352, 57 L. ed. 1511, 33 Sup. Ct. 729.

it possible to get at the principles involved. In this Minnesota Rate case it was laid down that for normal cases the rule was as simple as that there should be federal regulation for interstate rates and State regulation for intrastate rates. The rule may be simple, but its application is accompanied by so many computations based upon assumptions beyond the possibilities of proof as to make it all but impracticable. However, as the Supreme Court points out, whenever Congress judges that the proper regulation of interstate commerce requires that a federal Commission shall have power also over the intrastate rates, by such express legislation the interstate commission may be given exclusive jurisdiction over the rate situation. Until that time comes, there is no implication from the establishing of the jurisdiction of the Commission over interstate rates sufficient to take from the States the power to fix intrastate rates by such means as they may choose to employ.

§ 100. The Shreveport case.

In view of the strong dictum in the case just discussed it is not at all surprising that the federal courts have still more recently held that when rates established by a State commission directly interfered with the rate system established for the whole region, it may come in conflict with the federal jurisdiction as it stands to-day without further legislation by Congress. In the recent case known as the Shreveport Rate Case,²² the Supreme Court of the United States held that the Commission has power in effect to control rates maintained by the carrier in strictly intrastate transportation by insisting that such rates shall keep in line with the interstate structure. It was seen that to deprive Congress of this power would be to permit a State to place a burden upon interstate commerce, the very harm sought to be remedied by the commerce clause. The decision is significant in that the

²² *Houston, E. & W. T. Ry. v. United States*, 234 U. S. 342, 34 Sup. Ct. 823.

court has at last openly acknowledged the principle that Congress has the power to reach into and touch the internal affairs of a State without resorting to the refinement of designating such action a regulation of interstate commerce.

§ 101. The Intermountain case.

Nothing is more difficult to bring within these requirements than the issues raised in the Intermountain Case which has recently been decided by the Supreme Court. There is long history back of the case which has already been summarized in brief compass. Under Section 4, as it originally stood, the United States Supreme Court held that competition existing at the distant point while there was no competition at the intermediate point constituted a circumstance so dissimilar as to justify charging more for the short haul than for the long without getting permission from the Commission. As amended in 1910, jurisdiction to pass upon those cases where the carrier was charging more for the short haul than for the longer distance was unequivocally conferred upon the Commission. The Commission thereupon made some general orders as to the relation to be observed between the Intermountain rates and those to the Pacific coast. The railroads then contended that this is going beyond limits of the administrative function into the realm of arbitrary power. Whether this is so or not depends upon whether the Commission may be said to be basing its action upon principles of law applicable to the case. We cannot leave to a commission, any more than to the railroad itself, the power to build up communities or destroy them at its own whim or caprice. We must have here as elsewhere principles of law as to what things in the movement of traffic are of such weight as to determine the reasonableness of the rate charged. However, as to this particular matter it seems to be the opinion of the Supreme Court,²³ that, when competition is found in cases like these, the rate may be reduced suf-

²³ *United States v. Atchison, T. & S. F. Ry.*, 234 U. S. 476, 34 Sup. Ct. 986.

ficiently to meet it, has been so incorporated into the law governing this situation that all that is left to the Commission to do is to permit such reductions wherever it finds competition thus acting.

§ 102. The Pipe Line case.

One other constitutional limitation upon the regulating power should be noted. Regulation of this peculiar sort, going to the extent of compulsory service, should be confined to what may properly be considered public callings. Unless the business in question is one which is public in character it is not one which it would be due process of law to regulate to the extent of fixing its rates. And unless in the particular instance the business is being conducted upon a public basis, regulation to that extent of what is still a private affair would be equally improper. The business must be one in which the public has an interest, and at the same time one in which the proprietor has committed himself to serve the public. For the legislature to make a general rule applicable to all concerns in certain businesses, or for a commission acting by its authority, to order that the public should be served by any particular company, unless both requisites are present, would seem to deprive the owners and proprietors of their liberty and property. At all events, we shall know more about all this now that we have got the decision in the Pipe Line Cases,²⁴ from the Supreme Court. It was of course clear that the operation of pipe lines such as are involved in that case is a business which is affected with a public interest. But when proprietors are independent concerns which have never taken anything but their own oil through these lines, they can hardly be said to have put themselves in public service. However, if the principal dealers in oil are also the proprietors of the only pipe lines, there may be such an interdependence found that it can fairly be said that transportation is going on under

²⁴ 234 U. S. 548, 34 Sup. Ct. 956.

such conditions as to subject the whole matter to the regulation of the government for the protection of other shippers. At all events such is the opinion of the Supreme Court, so far as it can be gathered from the principal case.

§ 103. Inherent limitations upon Commission action.

We will not be content in our times with the sort of equity which the Chancellor originally evolved from his inner consciousness to deal with each case as it came before him. Still less will any people with the traditions of our race rest under proceedings of the order of the Star Chamber without being confronted with testimony against them. These decisions mean that as a people we will not be content to have our rights determined by administrative fiat; we demand reasoned judgment based upon ascertained principles generally understood. If the Commission is to be held to its function of administering the law, we must have some basis for determining the meaning of the word reasonable used in the Act. The Commission, as it has been seen, can only set aside a rate if it is unreasonable; in its place it can only fix a rate which is reasonable. But how is it to be determined what rates are unreasonable and what change would make them reasonable, unless we have definite principles universally recognized? The Interstate Commerce Commission itself has made noteworthy progress in the past few years in establishing by its decisions the bases upon which the reasonableness of rates depend as a matter of law. The Supreme Court has also of late years been giving the stamp of its approval to rules for the determination of the reasonableness of rates which seem at last to be practicable. Vague though a phrase in a statute may apparently be, yet it may well have a definite meaning in the law; and by the prevailing rule, when a given phrase has an accepted significance at common law, it should be taken in that sense. We must have some objective standard to go upon, or we have no security from subjective differences. What is reasonable

according to principles of law governing the matter is what we must insist upon in order to confine our commissions to administration. If we have nothing to rely upon except what seems upon the whole to the body in power desirable or impolitic, we can hope for nothing better than benevolent despotism subject to all the corresponding risks of arbitrary power.

CHAPTER III

FEDERAL JURISDICTION

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§ 110. Provisions of the Act.

With due deference to the constitutional limitations upon the federal government, section 1 of the Act gives the Commission jurisdiction over all services which shall be considered and held to be common carriers within the meaning and purpose of this Act, engaged in what is within the definitions of the Act as some form of transportation from one State or Territory of the United States or the District of Columbia, to any other State or Territory of the United States or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: Provided, however, that the provisions of the Act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid, nor shall they apply to the transmission of messages by telephone,

telegraph, or cable wholly within one State and not transmitted to or from a foreign country from or to any State or Territory as aforesaid. Generally speaking it is the theory of the Act that a service is within the jurisdiction of the Commission only to the extent that its course is a continuous one; but it is furthermore provided in section 7 that no carrier subject to the provisions of the Act shall enter into any combination, contract or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this Act.

§ 111. Scope of power conferred.

The entire commerce of the United States, foreign and interstate, is subject to the provisions of the act of Congress to regulate commerce; and the full force of the Act applies to all carriers and all circumstances within the jurisdiction of the Commission.²⁵ It is intended to and does apply, not only in cases of direct injury to particular individuals or industries, but also in cases involving indirect injury to the community as a whole.²⁶ The extent to which this control may go as a practical matter raises many difficult questions. Where a road runs through several States, it is quite obvious that, in determining the

²⁵ *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. ed. 940, 16 Sup. Ct. 666, 5 Int. Com. Rep. 405.

²⁶ *Re Export and Domestic Rates on Grain*, 8 I. C. C. 214.

reasonableness of a rate established by one of the States, the situation of the whole line must be considered. One of two plans must be adopted: If the income of the whole line is taken as a basis of inquiry, then the possibility of the other States fixing a similar rate must be considered; or if, on the other hand, the one rate is considered, its reasonableness must be determined by an examination of the capitalization and income of the road within the particular State. But the complexities of this matter are such that it cannot be intelligently discussed until the last chapter is reached.

Topic A. Foreign Commerce

§ 112. Foreign carriers.

The Commission can, of course, have no jurisdiction over transportation carried on entirely in a foreign country.²⁷ The word "adjacent," as used in the act to modify the words "foreign country," would seem to mean adjacent in the sense of the possibility of substantial continuity of rails.²⁸ Thus the Commission has held that it has no jurisdiction over rates for transportation wholly in Canadian territory.²⁹ And likewise, it has had occasion to decide that it has no jurisdiction over railroads operating in Mexico.³⁰ But the Commission has said that, as it is given by the Act jurisdiction over traffic moving from a point in the United States to a point in Canada, it may undoubtedly act upon the American carrier to the extent which it has jurisdiction, leaving it doubtful whether it could require American lines to establish and maintain for the future a rate to Canadian points.³¹ Therefore, in order to violate the Act, the giving of the rebate or other violation must take place within the United States, since an

²⁷ *Humbolt S. S. Co. v. W. P. & Y. R.*, 25 I. C. C. 136.

²⁸ *Lykes S. S. L. v. Commercial Union*, 11 I. C. C. 310.

²⁹ *Fullerton L. & S. Co. v. B. B. & B. C. R. R. Co.*, 25 I. C. C. 376.

³⁰ *Eagle P. L. Co. v. N. R. of Mex.*, 25 I. C. C. 5.

³¹ *Rates on Soda Ash and Other Commodities*, 28 I. C. C. 613.

Act of Congress cannot affect the legality of anything done outside its jurisdiction; and moreover, improper charging outside the United States cannot be punished under the Act.³² Nor can discrimination between places in Canada in respect to rates applicable in Canada constitute a violation of the Act.³³ As to foreign carriers the jurisdiction of the Commission is not to be determined by anything other than the language of Section 1, and its distinguishing between adjacent countries on our continent and carriage beyond our seaboard must be noted.³⁴

§ 113. Ocean carriers.

It is clearly the intent of the Act that the Commission should have no jurisdiction over ocean carriers. It is understood that the ocean rate varies frequently from day to day, depending upon the price of ocean freights; it is a matter of bargain which may become the subject of contract. Thus, an ocean carrier established under the laws of Cuba and transporting traffic between Havana and Galveston is not subject to the Act to Regulate Commerce.³⁵ The Commission has, therefore, no direct authority to require the issuing of through export bills of lading, since it has no jurisdiction over the water carriers.³⁶ Indeed, the act provides no machinery by which its provisions can be enforced as to trans-Atlantic steamship lines, and the absence of such provision can be explained only by accepting the interpretation that the Commission has no jurisdiction in the premises; and the pooling of traffic by water carriers is, therefore, a matter over which the Commission has no jurisdiction.³⁷ The distinction should be noted that while the Commission may regulate interstate traffic, whether by rail or by a combined rail-and-water

³² *United States v. Knight*, 3 Int. Com. Rep. 801.

³³ *Cist v. Michigan Central R. R.*, 10 Int. Com. Rep. 217.

³⁴ *Cosmopolitan S. Co. v. H.-A. P. Co.*, 11 I. C. C. 266.

³⁵ *Lykes S. S. Line v. C. U.*, 11 I. C. C. 310.

³⁶ *Galveston C. A. v. A., T. & S. F. Ry. Co.*, 25 I. C. C. 216.

³⁷ *Cosmopolitan S. Co. v. H.-A. P. Co.*, 11 I. C. C. 266.

route, from point of receipt to point of delivery, the Commission in its control over foreign commerce is limited to the regulation of such traffic, whether by railroad or by a combination of rail and water carriers, from and to the point of transshipment, the inland movement of such traffic being the only matter which the Commission can regulate.³⁸ Although the Commission has no jurisdiction of ocean rates, and must deal with the port differential question as though the ports were destinations instead of gateways, the rates to and from the water carrier are subject to all provisions of the Act.³⁹ The jurisdiction of the Commission over goods going out of a State in course of foreign commerce attaches although it is at first only moving on local bills.⁴⁰

§ 114. Foreign carriers and discriminations.

To a certain extent, so far as they may be applied in accordance with the principles fundamental in the conflict of laws, the provisions of the Act apply to foreign as well as domestic common carriers engaged in the transportation of passengers or property, for a continuous carriage or shipment from a place in the United States to a place in an adjacent foreign country. The common carriers engaged in such transportation apparently are subject to the provisions of the Act in respect to the printing of schedules of rates, fares, and charges for the traffic they carry, and posting and filing with the Interstate Commerce Commission of copies of such schedules. It was, therefore, early held by the Commission that the Grand Trunk Railway of Canada violated the Act by allowing a rebate on goods shipped from Buffalo to Canadian points.⁴¹ But the regulation of the transportation of foreign merchandise from

³⁸ *Aransas Pass Channel & Dock Co. v. G. H. & S. A. Ry. Co.*, 27 I. C. C. 403.

³⁹ *Chamber of Commerce of New York v. N. Y. C. & H. R. R. Co.*, 24 I. C. C. 55.

⁴⁰ *Railroad Commission of La. v. Texas & P. Ry.*, 229 U. S. 336, 57 L. ed. 1215, 33 Sup. Ct. 9.

⁴¹ *Re Grand Trunk Ry.*, 2 Int. Com. Rep. 496, 3 I. C. C. 89.

a port of entry to a place within the United States, upon a through bill of lading, does not extend to the control of rates made in the foreign port for its carriage to the port of entry of the United States, or to a foreign country adjacent.⁴² While the Commission must deal with the export and import rate differential question as though the ports were destinations, it may insist that there shall be no discrimination in treatment between the respective ports considered as localities.⁴³ And, consequently, the Commission will hold a refusal to issue through export bills of lading through one port, while issuing such bills through other ports to be an undue preference.⁴⁴

§ 115. Inland portion of foreign commerce.

The Act expressly provides that the Commission shall exercise jurisdiction over the inland portion of the haul, either to or from the foreign country; and it must logically and necessarily follow that the rate which must be filed with the Commission under section 6 of the Act is the rate governing such movement. On foreign commerce the rate to be published with the Commission should be the rate to the port and from the port—an open rate, which any who desire to do so may use with equal advantage.⁴⁵ Even that part of a continuous haul from a foreign country which is confined to a rail transportation from a port of entry to a point in the same State is within the jurisdiction of the Commission, although the shipment does not move under through billing nor do the water and rail lines operate under any common control or management.⁴⁶ It has been held that export traffic moving from a point of shipment whether on through or local bills, is subject to

⁴² *Mobile Ch. of Com. v. Mobile & O. R. R.*, 23 I. C. C. 417.

⁴³ *New York Bd. of Trade & Transp. v. Pennsylvania R. R.*, 3 Int. Com. Rep. 417, 4 I. C. C. 447.

⁴⁴ *Aransas Pass Channel & D.*

Co. v. G. H. & S. A. Ry. Co., 27 I. C. C. 403.

⁴⁵ *Cosmopolitan Shipping Co. v. H.-A. P. Co.*, 11 I. C. C. 266.

⁴⁶ *In re Rates of Louisiana Ry. & Nav. Co.*, 22 I. C. C. 558.

Act.⁴⁷ And it has been said that intrastate traffic, moving from a point in a State to a port in the same State for export, is within Act.⁴⁸ All this the Commission has reaffirmed recently; and that it is the view of Congress that such traffic is within its jurisdiction seems plain.⁴⁹ But the Commission has conceded that it has no jurisdiction over shipments of vessel-fuel coal, moving from an interior point to a port of the same State, delivery being made to the vessel at the dock.⁵⁰ And it has held that cotton billed locally to Philadelphia, and there sorted and rebilled to piers for export should be subject to storage regulations applicable to local traffic received at Philadelphia.⁵¹

§ 116. Requisites of port proportionals.

The export and import rates for traffic moving through the ports should be open rates for all shippers consigning in the same way. But the Commission has held the restriction to certain routes of the application of export rate from Texas to New Orleans not unreasonable.⁵² On the other hand it has held that tariffs for import from certain countries through Mobile should be revised so that the reduced rate would include other foreign countries.⁵³ The rate is only applicable to the traffic in question; and therefore where there was no notation on the bill of lading indicating that the shipments were for export, it was held that the domestic rate was properly assessed.⁵⁴ Railroads consequently have the right to prevent improper application of import rates by effective means, such as making them applicable only to traffic stored in bonded ware-

⁴⁷ *Red R. O. Co. v. T. & P. Ry.*, 23 I. C. C. 438.

⁴⁸ *Re Wharfage Charges at Galveston*, 23 I. C. C. 535.

⁴⁹ *Advances on Cotton*, 23 I. C. C. 404.

⁵⁰ *New Pittsburgh Coal Co. v. H. V. Ry. Co.*, 24 I. C. C. 244.

⁵¹ *DuMee, Son & Co. v. P. R. R. Co.*, 19 I. C. C. 575.

⁵² *Rates on Cottonseed and its Products*, 28 I. C. C. 219.

⁵³ *Molasses Rates from Mobile*, 28 I. C. C. 666.

⁵⁴ *Port Arthur R. M. Co. v. T. & F. S. Ry. Co.*, 28 I. C. C. 697.

houses or delivered from ship side.⁵⁵ But where importers at the port of entry who take manganese ore from the custody of the carrier at ship's side or at the dock, unless it is put in a custom-bonded warehouse, must pay domestic rates thereon, while under the existing rates, other parties might grind the ore at certain points and ship it therefrom at the import rates, it was held that this constituted an undue preference.⁵⁶ And the Commission may require that the railroads give the same milling rate on goods exported, no matter at what point in transit it is done.⁵⁷

§ 117. Export and import rates.

When the destination of goods shipped or their originating point is outside the country, so that the entire haul comprehends a partial haul within and a partial haul outside the country, it was at one time urged that there could be no difference in charge between cases where goods were shipped to or from the port, and cases where that was a port of export or import and the haul was only partially within the country. But it is now agreed that the principles governing through rates and local rates should apply to the situation, and that a lower proportionate rate may, therefore, be given to the goods designed for export or coming as imports, as compared with goods shipped to or from the port.⁵⁸ It should also be pointed out that, while the export rate is ordinarily lower than the domestic rate, this is due to competitive conditions between the ports, and not to the fact that the cost of service in export shipments is less than on domestic shipments.⁵⁹ Export or import rates are scheduled and terms thereof must strictly be followed; and, therefore, a railroad

⁵⁵ *Swift & Co. v. B. & O. R. R. Co.*, 21 I. C. C. 241.

⁵⁶ *In re Advances on Manganese Ore*, 25 I. C. C. 663.

⁵⁷ *New York C. & H. R. R. v. Interstate Com. Com.*, 168 Fed. 133.

⁵⁸ *National Lumber Exporters' Asso. v. St. L., I. M. & S. Ry. Co.*, 28 I. C. C. 215.

⁵⁹ *National Lumber Exporters' Asso. v. K. C. S. Ry. Co.*, 25 I. C. C. 78.

which had concurred in import rates on burlap was held bound thereby, although there was no agreed division via its line.⁶⁰ And, likewise, it was necessary to insist in another case that the joint through rate on imported logs from Mobile to Indianapolis is applicable only when the logs move direct to Indianapolis.⁶¹ The situation under discussion is the inland charge for traffic moving in foreign commerce; when a through rate is given to the foreign point these rulings are inapplicable.⁶² The mere contract of the ship agent with the interior shipper for the shipment of his freight to the foreign destination, usually called an engagement, is evidence of the transaction in question.⁶³

§ 118. Import rates regulated by competition.

The question was first definitely settled in connection with the New Orleans import rates. The Texas & Pacific Railway Company made in 1892 through rates from Liverpool and other foreign ports to San Francisco, the carriage being by steamship from Liverpool to New Orleans, and by railway over the lines of the Texas & Pacific Company, in connection with those of the Southern Pacific Company, to San Francisco. The amount of these through rates was less, sometimes not more than one-third of the rates charged by the Texas & Pacific Company for transporting similar traffic from New Orleans to San Francisco. The Texas & Pacific insisted that these through rates were absolutely fixed by water competition and that it must either take the traffic at that figure or abandon it altogether. The Commission held that as a matter of law, foreign competition could not be considered, and ordered the Texas & Pacific, and other roads concerned in the same litigation, to desist from allowing the discriminating rate. This order the Texas & Pacific Company refused to

⁶⁰ Memphis Freight Bureau v. B. & O. R. R. Co., 24 I. C. C. 543.

⁶¹ Talge Mahogany Co. v. S. Ry. Co., 25 I. C. C. 44.

⁶² St. L. & S. F. R. R. v. Burge-Forbes Co., 139 S. W. 3.

⁶³ Galveston Commercial Asso. v. A., T. & S. F. Ry. Co., 25 I. C. C. 216.

obey; the matter was taken to the courts, and finally to the Supreme Court of the United States.⁶⁴ The Supreme Court reversed the ruling of the Commission on the point of law. The court held that conditions abroad as well as conditions existing in the United States should be considered; that the interest of the carrier and the consuming community as well as the producing community must be taken into account; and that there was no hard and fast rule which prohibited the carrier, in furtherance of its own interest and the interests of its patrons, from accepting a less sum for the transportation of imported merchandise from the port of entry to an interior point than it charged for the transportation of domestic merchandise between the same points. Regarding the whole charge, from originating point to destination as a single through charge, therefore, there is nothing in the law to prevent the domestic carrier from receiving as his share of the through charge less than his local charge for the same haul.⁶⁵

§ 119. Export rates regulated by competition.

In the same way it is clear that export rates may be regulated by competition, and that the inland portion of a through export rate may reasonably be less, in a proper case, than the rate for the same haul when the traffic terminates at the exporting port. This was thoroughly considered by the Interstate Commerce Commission in the case of *Kemble v. Boston & Albany Railroad*.⁶⁶ In that case it appeared that the inland rate from Chicago to Boston was two cents higher than the rate from Chicago to New York; but the export rate to the two ports was the same. This was managed by allowing a rebate of two cents on goods which after arriving at Boston were actually shipped abroad. The Commission held the practice legal,

⁶⁴ *Texas & Pac. Ry. v. Int. Com. Comm.*, 162 U. S. 197, 40 L. ed. 940, 16 Sup. Ct. 666.

⁶⁵ See, to the same effect, *Mansion House Assoc. v. London & S. W. Ry.*, 9 Ry. & Can. Tr. Cas. 20.

⁶⁶ 8 I. C. C. 110.

Commissioner Prouty saying: "The ocean freights from Boston and New York are substantially the same. It follows, therefore, that the inland rate must also be the same. It has been decided that a differential of substantially 2 cents per hundred pounds may be properly made on domestic grain against Boston, but if the export rate were 2 cents higher to Boston than to New York, no traffic would move through the port of Boston. The object of these two rates, therefore, is to equalize the export rate between the ports of Boston and New York. The export rate to Boston is not in reality a Boston rate at all, but is in essence the inland division of a through rate through that port to foreign ports. That the inland carrier may receive in such case for its division a sum less than the domestic rate has been, as we have just seen, determined by the Supreme Court of the United States; hence the thing accomplished by the making of these two rates is not, as a matter of law, illegal." ⁶⁷

§ 120. Foreign competition justifies only necessary differences.

But while foreign competition may be considered in fixing the inland share of the through rate, the difference thus justified between the inland and the export or import rate is only such difference as is necessary to meet the competition.⁶⁸ The Supreme Court in *Texas & Pacific Railway v. Interstate Commerce Commission* under discussion distinctly pointed out that this was a question of fact to be determined in each case, and a question which was

⁶⁷ For a discussion of competition as affecting domestic and export lumber rates, see *Industrial Lumber Co. v. St. L. W. & G. Ry.*, 19 I. C. C. 50.

⁶⁸ In one proceeding involving export rates through different ports the Commission was of the opinion that differentials under New York on all-

rail and lake-and-rail export shipments from differential territory to Baltimore should not exceed 3 cents per 100 pounds, and to Philadelphia 2 cents, on classes and commodities other than grain; *Chamber of Commerce of New York v. N. Y. C. & H. R. R. Co.*, 24 I. C. C. 55.

not raised in the actual litigation. The questions whether certain charges were reasonable or otherwise, whether certain discriminations were due or undue, were questions of fact, to be passed upon by the Commission in the light of all facts duly alleged and supported by competent evidence. The mere fact that the disparity between the through and the local rates was considerable did not, of itself, warrant the court in finding that such disparity constituted an undue discrimination; much less did it justify the court in finding that the entire difference between the two rates was undue or unreasonable,—especially as there was no person, firm, or corporation complaining that he or they had been aggrieved by such disparity.⁶⁹

§ 121. Limitations upon export and import rates.

That foreign business must not be unduly favored at the expense of domestic business has been expressly pointed out by the Interstate Commerce Commission.⁷⁰ "The decision of the United States Supreme Court in *Texas & Pacific Railway Company v. Interstate Commerce Commission*, *supra*, has been understood in some quarters as virtually removing import and export traffic from the jurisdiction of the Commission. Such is not by any means its scope or effect. That decision simply broadened the power of the Commission in reference to such traffic. If any individual or locality feels itself aggrieved by the rates made upon export or import business as compared with domestic business, the Commission has full authority to consider and pass upon that grievance. The propriety, as a matter of fact, of the rates maintained by the Texas & Pacific Railway Company has never been upheld by the decision of any tribunal. It has

⁶⁹ In a later proceeding the Commission has pointed out that the difference in rates between north Atlantic and Gulf ports may be equalized in total through rates from

foreign port to St. Louis. *Memphis Freight Bureau v. B. & O. R. R. Co.*, 28 I. C. C. 543.

⁷⁰ *Kemble v. Boston & A. R. R.*, 8 I. C. C. Rep. 110, 115.

never been decided that that company may transport boots and shoes for the English manufacturer from New Orleans to San Francisco for one-sixth the amount charged the American manufacturer for the same service, but merely that, in determining whether such rate constitutes an unjust discrimination or an undue preference, the interest of the carrier and the consumer should be taken into account as well as that of the producer." It was accordingly held by the Commission, in the case of *New York Produce Exchange v. New York Central & H. R. Railroad*,⁷¹ that the inland portion of an export rate through New York must be no less than the inland rate from the originating point to New York. Nothing was shown in the case to justify a difference in rates; and it is no doubt the fact that no differential is needed in order to secure shipments for export through New York.

Topic B. Interstate Commerce

§ 122. What are considered States?

Commerce between an Indian reservation and other parts of the State in which it is situated is not interstate commerce.⁷² But commerce between the District of Columbia and the State of Maryland is interstate, and may constitutionally be so regarded.⁷³ Thus an electric line engaging in transportation between Washington, D. C., and Laurel, Md., must file and post its tariffs.⁷⁴ Likewise the Commission might establish rates from Oklahoma when it was a territory to the State of Texas.⁷⁵ One-way and round-trip fares between Washington, D. C., and Virginia points being found unreasonable, the defendant was required to provide commutation rates from designated stations so long as such rates are maintained from

⁷¹ 3 I. C. C. Rep. 138, 2 Int. Com. Rep. 553.

⁷² *Selkirk v. Stevens*, 72 Minn. 335, 75 N. W. 386, 40 L. R. A. 759.

⁷³ *Willson v. R. C. R. R.*, 7 I. C. C. Rep. 83.

⁷⁴ *Silvester v. C. & S. R. R. of Wash.*, 22 I. C. C. R. 201.

⁷⁵ *Corporation Com. of Oklahoma v. A. & S. Ry.*, 26 I. C. C. 520.

other stations under similar circumstances.⁷⁶ And in another case an electric line, operating between Washington, D. C., and Virginia points being held subject to Act, its passenger rates were ordered reduced.⁷⁷ The provision of the Act to Regulate Commerce applying to carriers transporting property "from one place in a territory to another place in the same territory," so far as it related to the Territory of Oklahoma, expired by its own force on November 16, 1907, when Oklahoma was admitted as a State.⁷⁸ And since the admission of Oklahoma as a State the Commission is without power to fix rates to be observed in the future within the present limits of that State.⁷⁹ The Commission at one time refused to take jurisdiction over alleged discrimination in service in Alaska, or to make orders giving relief from the conditions complained of.⁸⁰ Whereupon mandamus was sought in the courts to compel the Commission to take jurisdiction; and the United States Supreme Court finally held that Alaska was sufficiently within the word "territory" used in the Act.⁸¹

§ 123. What constitutes commerce between the States?

The question whether a certain transaction constitutes interstate commerce must be determined by ascertaining what the real transit is, and whether that traffic is or is not between separate States. The Supreme Court of the United States⁸² long ago held that whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States

⁷⁶ *Bitser v. W. V. R. R.*, 24 I. C. C. 255.

⁷⁷ *Beall v. W. A. & M. V. Ry.*, 20 I. C. C. 406.

⁷⁸ *Chandler Cotton Oil Co. v. F. S. & W. R.*, 11 I. C. C. 473.

⁷⁹ *Haines v. Chicago, R. I. & P. R.*, 11 I. C. C. 214.

⁸⁰ *Humbolt S. S. Co. v. W. P. & Y. R.*, 19 I. C. C. 105.

⁸¹ *Interstate Commerce Commission v. Humbolt S. S. Co.*, 224 U. S. 474, 56 L. ed. 308, 32 Sup. Ct. 556.

⁸² *The Daniel Ball*, 10 Wall. 557, 19 L. ed. 999.

See also *No. Carolina R. R. Co. v. Zachery*, 232 U. S. 248, 34 Sup. Ct. 305.

has commenced, and the fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one State and some acting through two or more States, in no respect affects the character of the transaction. And the United States Supreme Court⁸³ has very recently held that the Interstate Commerce Commission had jurisdiction to pass upon the reasonableness of the Denver & Rio Grande Railroad Company's freight rate from Pueblo to Leadville, both in the State of Colorado, on beer received at St. Louis by the Missouri Pacific Railroad Company to be delivered in Leadville, although no through rate or through route had been established, and although the freight was received by the first-named carrier at Pueblo as an independent shipment originating at that point, and was forwarded as an intrastate shipment on a local waybill, where all this was in accordance with a long-continued course of dealing between the two carriers under which they divided the freight according to their local rates, with the knowledge that it had been paid as compensation for the single haul.

§ 124. Traffic in movement between States.

It follows that, even under the proviso in Section 1 of the Act, to the effect that its provisions shall not apply to the transportation of passengers or property wholly within one State and not shipped to or from a foreign country from or to any State or Territory, a carrier participating in the movement of interstate commerce is not exempted from the Act by the fact that in handling its portion of the haul it operated wholly within one State. It is the essential character of the commerce, not its mere incidents, that determine whether or not it is interstate.⁸⁴

⁸³ Baer Bros. Mercantile Co. v. La. v. Texas & P. Ry., 229 U. S. 336, Denver & R. G. Ry. Co., 233 U. S. 57 L. ed. 1215, 33 Sup. Ct. 9. 479, 34 Sup. Ct. 641.

⁸⁴ Aransas P. C. & D. Co. v. G. H. & S. A. Ry. Co., 27 I. C. C. 403.

And the nature of commerce, not its mere accidents, must determine whether a shipment is local or foreign.⁸⁵ A railroad company whose road lies entirely within the limits of a single State becomes subject to the Act by participating in a through movement of traffic from a point in another State to a point in the State within which it is located, although its own service is performed entirely within the latter State.⁸⁶ The theory is that the movement of freight from a point in one State to a point in another State by rail must be regarded as an entirety; and every railroad participating in that movement thereby becomes subject to the Act to Regulate Commerce, even though its service is performed entirely within a single State.⁸⁷ Interesting questions arise as to transit when a point is at the boundary; and with boundary cities one must often be very exact as to the point of consignment.⁸⁸ But if coal is mined in Kentucky and loaded there by carrier, the fact that it is billed from a point in Tennessee to Kentucky does not make it an interstate shipment.⁸⁹

§ 125. Termini within a single State routed through another State.

The Commission has always held that commerce between points in the same State, but which in being carried from one place to the other passed through another State, is interstate commerce, and subject to regulation by the provisions of the Act.⁹⁰ The Commission logically

⁸⁵ *Port Arthur Rice Milling Co. v. T. & P. Ry. Co.*, 28 I. C. C. 697.

⁸⁶ *Baer Bros. Mercantile Co. v. Mo. P. R. Co.*, 11 I. C. C. 329.

⁸⁷ *Leonard v. Kansas City S. R. Co.*, 11 I. C. C. 573.

⁸⁸ *Texarkana Freight Bureau v. St. L., I. M. & So. Ry.*, 28 I. C. C. 569.

⁸⁹ *Louisville & N. R. R. v. Vancleave*, 110 Ky. 968, 63 S. W. 23.

⁹⁰ *New Orleans Cotton Exch. v. Cincinnati, N. O. & T. P. Ry.*, 2

Int. Com. Rep. 519, 2 I. C. C. 375; *Milk Producers' Protective Assoc. v. D., L. & W. R. R.*, 7 I. C. C. Rep. 92; *Wells Higman Co. v. St. L., I. M. & S.*, 18 I. C. C. 175; *Wilman & Co. v. St. L., I. M. & S. Ry. Co.*, 22 I. C. C. 405; *Bridgeman-Russel Co. v. G. N. Exp. Co.*, 22 I. C. C. R. 573. *Johnson & Hunt v. St. L., I. M. & S. Ry. Co.*, 24 I. C. C. 648; *National Lumber Exporters & Asso. v. K. C. S. Ry. Co.*, 25 I. C. C. 78; *Baker Com. Club v. O. W. R. R. & N. Co.*,

goes to the length of holding traffic from points of origin in West Virginia to destinations in the same State, necessarily passing in transit about 1,500 feet through Kentucky to be subject to its jurisdiction.⁹¹ But recently a petition to establish between two points in same State a through route and joint rate via a circuitous interstate route was properly dismissed.⁹² The Commission also considers as within its jurisdiction a shipment between two points in Maine which passes through a portion of the Dominion of Canada.⁹³ At all events it deals on that basis with a "transit rate" used in sense of rate applicable to business originating in United States, going through Mexico, destined to points in United States.⁹⁴ The decisions of the courts upon these particular questions have been conflicting, and even at the present day are still apparently inconsistent on different phases of the wider problem. At one time it seemed that such commerce as now under consideration would not be held interstate commerce.⁹⁵ But there were always cases in the State courts to the contrary; and comparatively recently this particular point has been decided by the Supreme Court of the United States in favor of the jurisdiction of the federal Commission over such commerce as against the claims of the State commissions.⁹⁶

25 I. C. C. 281; Board of Trade of Winston-Salem v. N. & W. Ry. Co., 26 I. C. C. 146.

⁹¹ West Va. R. Co. v. B. & O. R. R. Co., 26 I. C. C. 622.

⁹² Haverhill Box Board Co. v. B. & A. R. R. Co., 28 I. C. C. 336.

⁹³ American Agricultural Chem. Co. v. B. & A. R. R. Co., 28 I. C. C. 398.

⁹⁴ Steinfeld & Co. v. I. C. R. R. Co., 20 I. C. C. R. 12.

⁹⁵ Lehigh Valley R. R. v. Pennsylvania, 145 U. S. 192, 36 L. ed. 672, 12 Sup. Ct. 806, 4 Int. Com. Rep. 87; United States v. Lehigh Valley R. R.,

115 Fed. 373; Seawell v. Kansas City, F. S. & M. R. R., 119 Mo. 222, 24 S. W. 1002, 5 Int. Com. Rep. 262; Dillon v. Erie R. R., 19 N. Y. Misc. 116, 43 N. Y. Supp. 320; Railroad Com. v. Telegraph Co., 113 N. C. 213, 18 S. E. 389.

In Ewing v. Leavenworth, 226 U. S. 464, 33 Sup. Ct. 81, State authorities were permitted to tax such business.

⁹⁶ Hanley v. Kansas City So. Ry. Co., 187 U. S. 617, 47 L. ed. 333, 23 Sup. Ct. 214; State v. Chicago, S. P., M. & O. R. R. Co., 40 Minn. 267, 3 L. R. A. 238; Sternberger v. Cape

§ 126. Carriage wholly within a State.

Carriage performed wholly within a State is not within the Interstate Commerce Act by explicit proviso in the Act itself, and indeed could not well be subjected by the federal government to regulation since it does not constitute interstate commerce. Thus it has several times been held by the federal courts that a railroad company whose line is wholly within a single State, and which, although it carries freight destined to points beyond such State, never issues bills of lading to points beyond its own line, receives no freight on through bills of lading, and has no arrangement with other roads for a convention division of charges, or for a common control or management, it is not within the provision of the Interstate Commerce Act or similar legislation regulating commerce by railroad.⁹⁷ A railroad, lying wholly within a State and keeping itself from entangling concurrences with other railroads, which transports freight, whether coming from within or without the State, solely on local bills of lading, under a special contract limited to its own line, and without dividing charges with any other carriers or assuming any other obligations to or for them, does not come within the provisions of the Interstate Commerce Act, and is not bound to make any report of its business to the Commission.⁹⁸ The Commission, consequently, has frequently held that it has no jurisdiction to order any reduction in rates for transportation wholly intrastate.⁹⁹ And likewise when a

Fear & Y. V. R. R. Co., 29 S. C. 510; *Delaware & H. C. Co. v. Com. (Pa.)*, 2 Int. Com. Rep. 222.

A State Commission has power to fix rates of a steamship company plying on the high seas between two ports of the State. *Wilmington Transp. Co. v. Railroad Commission (Calif.)*, 137 Pac. 1135; *aff. U. S. Sup. Ct.*, Feb. 1, 1915.

⁹⁷ *United States v. Geddes*, 131 Fed. 452. See also *United States*

v. B. Z. & C. Ry. Co., 81 Fed. 783.

⁹⁸ Compare *Mutual Transit Co. v. United States*, 178 Fed. 664, where a carrier was held not to have engaged itself with other carriers in interstate commerce, with *Illinois Terminal Co. v. United States*, 168 Fed. 46, where the facts showed that the traffic was taken on a through basis.

⁹⁹ See *Railroad Comm. of Ark. v. St. L. & N. Ark. R. R. Co.*, 12 I. C. C.

discrimination complained of does not affect interstate service, the Commission has ruled that it has no jurisdiction, unless a preference in that service is directly effected thereby.¹

§ 127. Local carriage when through transportation contemplated.

Even though passengers or goods are being carried between two States, a carrier transporting them may nevertheless not be engaged in interstate commerce. Though a carrier receives goods directed to a point outside the State, he is not an interstate carrier if he is only to carry within the State, and there deliver to an entirely independent succeeding carrier, with whom he has no common arrangement.² The same rule applies if the carrier receives within the State of destination goods brought from without the State by an entirely independent course of commerce.³ So where goods were shipped in New Jersey, directed to a consignee in New York, but carried only to Jersey City and there received by the consignees, the shipment was not considered interstate.⁴ Mere intention on the part of a shipper to export his traffic, unaccompanied by any circumstance or outward indication that the traffic is in fact for export, is not sufficient to stamp it as foreign commerce.⁵ It has always been the understanding of the Commission that no jurisdiction has been given it over a shipment moving from one point to another in same State, though intended to go beyond the State and subsequently rebilled beyond State.⁶ And,

233; *Pierce Co. v. N. Y. C. & H. R. R.*, 19 I. C. C. 579; *Wells-Higman Co. v. G. R. & I. Ry. Co.*, 19 I. C. C. 487; *Roberts Cotton Oil Co. v. I. C. R. R. Co.*, 21 I. C. C. 248.

¹ *Local Commercial Telephone Service in Pittsburgh*, 27 I. C. C. 622; *Arkansas Fertilizer Co. v. St. L., I. M. & S. Ry. Co.*, 25 I. C. C. 645.

² *Ex parte Koehler*, 30 Fed. 867.

³ *Fort Worth & D. C. Ry. Co. v. Whitehead*, 6 Tex. Civ. App. 595, 26 S. W. 172.

⁴ *New Jersey Fruit Exchange v. Central R. R.*, 2 Int. Com. Rep. 84, 2 I. C. C. 142.

⁵ *Port Arthur Milling Co. v. T. & F. S. Ry. Co.*, 28 I. C. C. 697.

⁶ *Big Canon Ranch Co. v. G. H. & S. A. Ry. Co.*, 20 I. C. C. R. 523.

indeed, a movement in fact interstate has been held by intervening possession of an independent sort to have been converted into two local movements.⁷

§ 128. Beginning and ending of interstate transit.

On the principles already examined, if the transit is a single unit, continuing from the time of the original shipment to the ultimate end of the carriage, with the beginning and ending in different States, the entire transit from beginning to end is regarded as interstate; it does not cease to be interstate when the goods finally enter the State of destination, but continues an interstate transit even within that State until delivery.⁸ Indeed, under the Act, it appears that it was the purpose of Congress to assume jurisdiction over the entire subject matter relative to interstate shipments, from the time of the origin of such shipment down to the point where the shipment is entirely at an end, and its character as a transaction of interstate commerce ceases.⁹ On the other hand, the movement of a shipment between points in a State, and a subsequent movement out of the State, is as to the first shipment not interstate commerce, where there is nothing to connect the two shipments, whether in the billing or the charges imposed.¹⁰ And correspondingly where goods which had been consigned to one point within a State were afterwards sold and forwarded to another point, the final movement is intrastate commerce and subject to the rates established by the State commission.¹¹ There is no arrangement for a continuous carriage or shipment from one State to another between a carrier by railroad and a

⁷ *Southwestern Shippers' Traffic Asso. v. A., T. & S. F. Ry. Co.*, 24 I. C. C. 570. & *S. F. R. R. Co. v. State*, 26 Okla. 62, 72, 107 Pac. 929.

⁸ *Cattle Raisers' Assoc. v. F. W. & D. C. Ry.*, 7 I. C. C. Rep. 513. See also *State v. Southern P. Ry.* (Tex. Civ. App.), 49 S. W. 252.

⁹ *Pittsburgh Vein Operators v. Pa. Co.*, 24 I. C. C. 280. See also *St. L.*

¹⁰ *Johnson v. M. St. P. & S. S. M. Ry. Co.*, 22 I. C. C. 255.

¹¹ *Acme Cement Co. v. C. & A. R. R.*, 17 I. C. C. 220. See also *Gulf, C. & S. F. Ry. Co. v. Texas*, 204 U. S. 403, 51 L. ed. 540, 27 Sup. Ct. 360.

carrier by water not subject to the Act when shipments by railroad entirely within one State are consigned in care of a carrier by water, which acts as agent of the consignee at a port in that State, and the carrier by water transports these consignments to a point in another State, such ultimate destination not appearing in the rail carrier's bill of lading.¹² So where goods are shipped in one State, directed to a consignee in another, but carried only to the State line, and there received by the consignees, the shipment is not interstate.¹³

§ 129. Precedent and subsequent transportation.

A mere switching company which transfers goods from one carrier to another within the State, entirely without reference to their final destination, is not engaged in interstate commerce, whatever the destination of the goods.¹⁴ This is true whether the switching is before or after loading, so long as the goods have not as yet been put in course of interstate shipment.¹⁵ But it seems clear that the extent to which deliveries of goods billed through in carload lots should be made by switching cars upon sidings can be made the subject of orders by the Commission.¹⁶ And where a railroad system engaged in interstate commerce controls through stock ownership a wharf company, which has been chartered for the purpose of furnishing terminal facilities, the conduct of such a terminal is subject to the jurisdiction of the Commission.¹⁷ The distinction taken by the Commission seems to be that undoubtedly the practices of the carrier regarding delivery are within control of Commission, but where the handling

¹² *Re Transportation by the C. & O.*, 21 I. C. C. 207.

¹³ *United States v. C., K. & S. R. R. Co.*, 81 Fed. 783.

¹⁴ *Kentucky & I. Bridge Co. v. L. & N. R. R.*, 37 Fed. 567, 2 L. R. A. 289, 2 Int. Com. Rep. 102.

¹⁵ *Missouri Pacific R. R. Co. v.*

Larrabee Flour Mills, 211 U. S. 612, 53 L. ed. 352, 29 Sup. Ct. 696.

¹⁶ *Interstate Commerce Commission v. Atchison, T. & S. F. Ry.*, 234 U. S. 294, 34 Sup. Ct. 814.

¹⁷ *Southern Pac. Terminal Co. v. Int. Com. Comm.*, 219 U. S. 498, 31 Sup. Ct. 279.

follows delivery to the shipper the Commission is without power.¹⁸ Therefore, so far as the carrier has assumed delivery by switch, the Commission will entertain such questions as whether the defendant carrier should not be required to embrace complainants' mills within the switching limits of Portland, Oregon, though not located within the city of Portland.¹⁹ Where the transportation in question is plainly disconnected from the interstate transportation it is not difficult to declare the movement altogether intrastate. Thus the cab service from a railroad station, even when operated under the auspices of the railroad itself, is wholly subject to local regulation.²⁰ So a common carrier engaged in transferring passengers and baggage between railroad stations and between such stations and hotels and private residences, though performing a service connected with interstate passenger traffic, is nevertheless not subject to the provisions of the Act.²¹

§ 130. Power to fix rates under the Constitution.

The power of Congress either directly or through a commission to fix the rates of carriers in interstate carriage was formerly but not recently doubted. It would have been extraordinary if such power were not granted by the Constitution. We have seen that the power existed at common law, and was exercised in England before the Revolution, as well as in the States. At the time of the adoption of the Constitution the power was lodged in the States. It is a maxim of constitutional law that all power not granted to the United States in the Constitution remains in the States; the Constitution of the United States was a power-conferring, not a power-destroying document.²² But nothing can be clearer than that the

¹⁸ *Cosby v. R. T. Co.*, 23 I. C. C. U. S. 21, 48 L. ed. 325, 24 Sup. Ct. 72, 77. 202.

¹⁹ *Portland Lumber Co. v. O. W. R. R. & N. Co.*, 21 I. C. C. 292. ²¹ *Anacostia Citizens Asso. v. B. & O. R. R. Co.*, 25 I. C. C. 411.

²⁰ *New York ex rel. v. Knight*, 192 ²² That the Congress may em-

right of fixing rates for interstate commerce is no longer in the States; a fixing of rates by legislation or commission would be a regulation of interstate commerce, which Congress alone has power to regulate. It would seem to follow without possibility of doubt that the power which was taken away from the States by the Constitution, because it was a power to regulate commerce, was at the same time conferred, as such power, on the Congress.²³

§ 131. Extent of the federal jurisdiction.

Sometimes it is said that only the federal government has power over interstate matters, and that the States alone have any concern with intrastate matters. But it has always been discovered when it came to the test, that in the traffic movements of railroad companies performing both interstate and intrastate service, there are inextricable complications in any entire separation.²⁴ By the better view when the matter is common ground the State will not be kept from the field unless action by the nation has inclosed it. But even so there is the question as to what may fairly be considered as offering scope for regulation by either the State or the nation. The decisions as to rates and as to service notably differ in this regard. It seems to be agreed that in respect to rates neither can consider the earnings appropriate to the other, but that in ordering facilities either can consider the business of the

power a Commission to fix rates for carriage between the States has long since been assumed, but of course in fixing rates due process of law must be observed; and no one shall be deprived of life, liberty or property in defiance of the guaranties of the Constitution. *Louisville & N. R. R. v. Interstate Commerce Commission*, 195 Fed. 541 (1912).

²³ In *Railroad Commission of Ohio v. Worthington*, 225 U. S. 101, 32 Sup. Ct. 653 (1912), it was pointed

out that the railroad commission of a State had in a case where Congress had not acted, no more than in any other case, no authority which could constitutionally be given it to fix a part of a through rate for a transit which was essentially interstate.

²⁴ See *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 89, 18 Sup. Ct. 418.

And see the *Minnesota Rate Cases*, 230 U. S. 352, 57 L. ed. 1511, 33 Sup. Ct. 729, discussed fully in the last chapter.

other.²⁵ The further discussion of these matters is postponed until the last chapter, where these rules are considered in detail.

Topic C. Continuous Carriage under Common Control

§ 132. Existence of common arrangement.

When goods are shipped under a through bill of lading from a point in one State to a point in another, and are taken by a State common carrier under a conventional division of the charges, such carrier must be deemed to have subjected its road to an arrangement for a continuous carriage or shipment within the meaning of the law.²⁶ The through billing and rating is the usual but by no means the only method of manifesting a common arrangement.²⁷ In the case of carriage of passengers a similar interpretation will be made; assent by a carrier to the issue of a through ticket over several railroads constitutes an arrangement for continuous carriage.²⁸ Where, therefore, a local carrier takes part in the carriage of goods through to destination in another State, though its share of the carriage is entirely within the State, it is engaged in interstate commerce.²⁹ This is often shown to be the case by a through billing and rating of the goods assented to by the carrier in question.³⁰ In Texas it has

²⁵ See *Atlantic C. L. Ry. v. No. Car. Corp. Comn.*, 206 U. S. 1, 51 L. ed. 993, 27 Sup. Ct. 585.

And see *Grand Trunk Ry. v. Railroad Commission of Michigan*, 231 U. S. 457, 34 Sup. Ct. 152, and generally the last chapter.

²⁶ *Cincinnati, N. O. & T. P. Ry. Co. v. Int. Com. Comm.*, 162 U. S. 184, 40 L. ed. 935, 16 Sup. Ct. 700; *Louisville & N. R. R. Co. v. Behlmer*, 175 U. S. 648, 44 L. ed. 309, 20 Sup. Ct. 209; *United States v. Seaboard Ry. Co.*, 82 Fed. 563; *Interstate S. Y. Co. v. Indianapolis U. Ry. Co.*, 99 Fed. 472.

²⁷ *State v. Gulf, C. & S. F. Ry. Co.* (Tex. Civ. App.), 44 S. W. 542.

²⁸ *Carrey v. Spencer*, 36 N. Y. Supp. 886; *Missouri, K. & T. R. R. Co. v. Fookes* (Tex. Civ. App.), 40 S. W. 858.

²⁹ *Norfolk & W. R. R. Co. v. Pa.*, 136 U. S. 114, 34 L. ed. 394, 10 Sup. Ct. 958; *Ex parte Kochler*, 30 Fed. 867; *Augusta So. R. R. Co. v. Wrightsville & T. R. R. Co.*, 74 Fed. 522.

³⁰ *Cincinnati, N. O. & T. P. Ry. Co. v. Int. Com. Comm.*, 162 U. S. 184, 40 L. ed. 935, 16 Sup. Ct. 700.

been held that through billing is not enough, and a State carrier is not engaged in interstate commerce unless it takes part in a through rating.³¹ But it is now certain that the rating need not be joint; the State carrier is none the less an interstate carrier, because its share of the total rate is equal to his entire local rate, if it takes part in or permits through billing.³² And it does not seem necessary for the establishment of a through carriage to prove that a technical through rate has been named.

§ 133. Continuity of interstate shipment.

If the transporting of goods or passengers to an ultimate destination in another State has begun, interstate commerce has begun, and no device to break up the transit into intrastate portions will affect its real nature. So where transportation of goods destined for a point without the State has been actually begun, temporary stoppage within the State without the intention of abandoning the original movement (which movement is ultimately completed), will not deprive the transportation of the character of interstate commerce.³³ And so if the goods are first billed to a point in the State of shipment, and at that point are rebilled to their ultimate destination in another State, without breaking of bulk, the whole constitutes a single carriage.³⁴ Neither is the continuity of the shipment broken by a sale of the goods *in transitu*.³⁵ If, however, the goods are consigned to a dealer and he, selling them before arrival, rebills to the purchaser without

³¹ Gulf, C. & S. F. Ry. Co. v. Nelson, 4 Tex. Civ. App. 345, 23 S. W. 732; Houston & T. C. Ry. Co. v. Williams (Tex. Civ. App.), 31 S. W. 556; Houston & T. C. Ry. Co. v. Davis, 11 Tex. Civ. App. 24, 31 S. W. 308.

³² United States v. Seaboard Ry. Co., 82 Fed. 563.

³³ Cutting v. Florida Ry. & Nav. Co., 46 Fed. 641.

³⁴ Texas & P. Ry. Co. v. Avery (Tex. Civ. App.), 33 S. W. 704; Houston, D. & N. Co. v. Insurance Co., 89 Tex. 1, 32 S. W. 889, 30 L. R. A. 713, 59 Am. St. Rep. 17.

³⁵ Gulf, C. & S. F. Ry. Co. v. Fort Grain Co. (Tex. Civ. App.), 72 S. W. 419.

breaking bulk, the two carriages are distinct.³⁶ The transit is a single unit, continuing from the time of the original shipment to the ultimate end of the carriage; and where the beginning and end are in different States, the entire transit from beginning to end is interstate. It does not cease to be interstate when the goods finally enter the State of destination; it continues an interstate shipment even within that State, until delivery.³⁷ Therefore it has been held that any attempt by the State to make orders in regard to the switching of such shipments to the consignee is a regulation of interstate commerce.³⁸

§ 134. Relations with water lines.

Section 1 of the Act defines as subject to its provisions any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment). Thus carriers partly by railroad and partly by water under a common arrangement for a continuous carriage are as specifically within the terms of the Act as any other carriers named therein.³⁹ While a mere agreement by an independent water carrier to accept freight from a connecting railroad and to transport it for its own particular rate, may be an "arrangement" for continuous carriage, but it is not a "common arrangement" within the meaning of the Act.⁴⁰ By concurring in through tariffs in connection with a railroad, steamship companies become subject to the jurisdiction of the Commission with respect

³⁶ *Gulf, C. & S. F. Ry. Co. v. State*, 97 Tex. 274, 78 S. W. 495, *aff'd in Gulf, C. & S. F. Ry. Co. v. Texas*, 204 U. S. 403, 51 L. ed. 540, 27 Sup. Ct. 360. Sup. Ct. 722. See also *Interstate S. Y. Co. v. Indianapolis U. Ry. Co.*, 99 Fed. 472.

³⁷ *State v. Southern Ry. Co.* (Tex. Civ. App.), 49 S. W. 252.

³⁸ *McNeill v. Southern Ry. Co.*, 202 U. S. 543, 50 L. ed. 1142, 26

³⁹ *Interstate Commerce Commission v. Goodrich T. Co.*, 224 U. S. 194, 56 L. ed. 729, 32 Sup. Ct. 436.

⁴⁰ *Mutual Transit Co. v. U. S.*, 178 Fed. 664.

to traffic in question.⁴¹ And so a steamship line, under a common arrangement with rail carrier, is subject to the Act and entitled to form part of a through route.⁴² However, through export bills of lading can only issue as the result of an agreement between the railway and the steamship; and the railroad company consequently has no power to issue a through export bill of lading without the consent of the steamship company.⁴³ The Commission only has jurisdiction clearly when the rail and water lines have thus combined in through service to the extent of the rates covered by the concurrence, and so long only as they may fairly be said to be still current.⁴⁴ The Commission has had occasion frequently to pass upon the propriety of such rates thus put in force, exercising the same power with respect to them as to joint rates all rail.⁴⁵

§ 135. What constitutes continuous carriage.

Through billing and rating is the usual but by no means the only method of manifesting a common arrangement.⁴⁶ Under the Act a common arrangement is established by proof of shipment under a through bill of lading and a continuous interstate carriage thereunder, coupled with proof of concerted action among the connecting carriers with regard to the payment of charges even if an agreed division of the rate is not shown.⁴⁷ Surely, under any

⁴¹ *Augusta & Savannah Steamboat Co. v. O. S. S. Co. of Savannah*, 26 I. C. C. 380.

⁴² *Flour City S. S. Co. v. L. V. R. R.*, 24 I. C. C. 179.

⁴³ *Galveston Commercial Asso. v. A., T. & S. F. Ry.*, 25 I. C. C. 216.

⁴⁴ *Benton Transit Co. v. Benton Harbor & St. J. & R. L. Co.*, 11 I. C. C. 542.

⁴⁵ See for example *Southwestern Shippers' Traffic Asso. v. A. O. T. & S. F. Ry.*, 24 I. C. C. 570; *Business Men's League of Albert Lea v. B. &*

O. R. R. Co., 24 I. C. C. 125; *Chamber of Commerce of New York v. N. Y. C. & H. R. R. Co.*, 24 I. C. C. 55; *Escanaba Business Men's Asso. v. A. A. R. R. Co.*, 24 I. C. C. 11; *Colorado Mfrs. Asso. v. A., T. & S. F. Ry. Co.*, 28 I. C. C. 82.

⁴⁶ *Troy Board of Trade v. Ala. M. Ry.*, 4 Int. Com. Rep. 348, 6 I. C. C. 1; *Daniels v. Chicago, R. I. & P. Ry.*, 6 I. C. C. Rep. 458; *Pennsylvania Millers' State Assoc. v. P. & R. R. R.*, 8 I. C. C. Rep. 531.

⁴⁷ *Standard Oil Co. v. United States*, 179 Fed. 614.

conventional division of charges, a carrier must be deemed to have subjected its road to an arrangement for a continuous carriage or shipment within the meaning of the Act.⁴⁸ Thus such common arrangement exists in a case where the initial carrier furnishes the shipper with a car specially fitted up for his business, which is taken over connecting roads on special through time tables.⁴⁹ So where a short line of railroad, entirely within a State, was operated entirely by an interstate railroad as a link in interstate carriage, there was held to be common control.⁵⁰ The receipt successively by two or more carriers for transportation of traffic shipped under through bills for continuous carriage over their lines, is assent to such a "common arrangement"; and previous formal arrangement between them is not necessary to bring such transportation under the terms of the Act.⁵¹ The words "through route" contemplate an agreement, voluntary or under requirement of the Commission, of two or more carriers to provide a line made up of all or parts of their lines between certain points.⁵² The fact that through tickets are not used, or through rates paid, does not prove the transportation to be other than interstate; for a through route exists when passengers are actually transported by continuous carriage.⁵³

§ 136. Local carrier participating in through carriage.

Where a local carrier takes part in the carriage of goods through to destination in another State, though his share of the carriage is entirely within the State, he is engaged in interstate commerce.⁵⁴ This is often shown to be the

⁴⁸ *Chicago, B. & Q. R. R. v. United States*, 157 Fed. 830.

⁴⁹ *Boston Fruit & P. Exch. v. N. Y. & N. E. R. R.*, 3 Int. Com. Rep. 493, 4 I. C. C. 664.

⁵⁰ *Heck v. East Tennessee, V. & G. Ry.*, 1 Int. Com. Rep. 775, 1 I. C. C. 495.

⁵¹ *Trammell v. C. S. Co.*, 4 Int. Com. Rep. 120, 5 I. C. C. 324.

⁵² *Kansas City v. K. C. V. & T. Ry. Co.*, 24 I. C. C. 22.

⁵³ *Citizens of Somerset v. W. Ry. & Co.*, 22 I. C. C. 187.

⁵⁴ *Norfolk & W. R. R. v. Pa.*, 136 U. S. 114, 34 L. ed. 394, 10 Sup. Ct. 958, 3 Int. Com. Rep. 178.

case by a through billing and rating of the goods, assented to by the carrier in question.⁵⁵ Even under the proviso of section 1 of the Act to the effect that its provisions shall not apply to the transportation of passengers or property, wholly within one State and not shipped to or from a foreign country from or to any State or Territory, it has recently been pointed out that a carrier participating in the movement of interstate commerce is not exempted from the Act by the fact that in handling its portion of the haul it operated wholly within one State.⁵⁶ And the Commission takes the position that under the reading of the Hepburn Amendment it has jurisdiction over carriers engaged in the transportation wholly by railroad from one State to another, irrespective of common control, management or arrangement, and the test of jurisdiction is not the arrangement under which the freight is delivered, but rather the character of the transportation itself.⁵⁷ From the time that the carriage of goods destined for delivery outside the State has begun within the State, the transit is interstate in character.⁵⁸ And, correspondingly, the carriage continues to be interstate after the goods are within the State to which they are consigned, until the transit is over.⁵⁹ There are a good many cases in the courts decided in accordance with the general principles discussed in this section.⁶⁰ And there are also subjoined additional citations from the reports of the Commission bearing upon this matter of compelling the establishment of through service between carriers not yet committed to common arrangements.⁶¹

⁵⁵ Cincinnati, N. O. & T. P. Ry. v. Int. Com. Comm., 162 U. S. 184, 40 L. ed. 935, 16 Sup. Ct. 700, 5 Int. Com. Rep. 391.

⁵⁶ Denver & R. G. R. Co. v. I. C. C., 195 Fed. 968.

⁵⁷ Leonard v. K. C. S. Ry. Co., 13 I. C. C. 573.

⁵⁸ Cutting v. Florida Ry. & N. Co., 46 Fed. 641.

⁵⁹ State v. Southern Ry., 49 S. W. 252.

⁶⁰ Louisville & N. Ry. v. Van Cleave, 110 Ky. 968, 63 S. W. 23. See Fisher v. Gt. Northern Ry., 49 Wash. 205, 95 Pac. 77.

⁶¹ Cardiff Coal Co. v. C., M. & St. P. Ry. Co., 13 I. C. C. 460; St. Louis, S. & P. R. R. v. P. & P. U. Ry. Co., 26 I. C. C. 226.

§ 137. Intrastate part of interstate movement.

It has been seen that a movement wholly within State which is part of through movement is within the Act.⁶² The Commission, therefore, has jurisdiction over a shipment between two points in same State, when for transshipment beyond State.⁶³ Where the through rates and charges must necessarily be made up of the separately established rates and charges, because there is no joint tariff, the law requires that carriers subject to the Act must publish and file such separately established rates and charges.⁶⁴ And where there is an interstate rate between points in the same State, such interstate rate, and not a lower State rate, is the proper rate to be used in making up a combination through rate on an interstate shipment in the absence of a joint rate.⁶⁵ The fact that a rate is used in combination with other rates does not prohibit it from being considered as a separately established interstate rate.⁶⁶ If a discrimination results from the combination of a State and an interstate rate, both established by the same carrier, the matter is not withdrawn from the jurisdiction of the Commission by the fact that the discrimination is produced by an improper State rate—certainly not when the State rate is voluntarily made by the carrier.⁶⁷ For a carrier to apply higher rates to interstate than to State traffic under like conditions, is a violation of the Act.⁶⁸ It follows that the intrastate portion of combination through rate may be attacked before the Commission as unreasonable.⁶⁹

⁶² *Grand Junction Ch. of C. v. D. & R. G.*, 23 I. C. C. 115.

⁶³ *Pittsburgh Vein Operators of Ohio v. P. Co.*, 24 I. C. C. 280.

⁶⁴ *Eagle P. L. Co. v. N. Rys. of M.*, 25 I. C. C. 7.

⁶⁵ *Coffeyville B. & T. Co. v. St. L. & S. F. R. R. Co.*, 25 I. C. C. 101.

⁶⁶ *Disher Hoop & Lumber Co. v. St. L. & S. F. R. R. Co.*, 26 I. C. C. 488. See also *Sieber Co. v. Chi-*

cago, M. & St. P. Ry., 18 I. C. C. 172.

⁶⁷ *Reliance Textile & Dye Works v. So. R. Co.*, 11 I. C. C. 48.

⁶⁸ *Keogh v. M., St. P. & S. Ste. M. Ry. Co.*, 26 I. C. C. 73; see also *Barr Bros. & Co. v. Mo. Pac. Ry.*, 13 I. C. C. 329.

⁶⁹ *Lebanon Commercial Club v. L. & N. R. R. Co.*, 25 I. C. C. 277; *Du Pont de Nemours Powder Co. v.*

§ 138. Line of the distinction.

Two cases in the Supreme Court of the United States will serve excellently to make the line of distinction by which cases are now decided. It was held in one case⁷⁰ that the reshipment by the consignee to other points within the State of coal consigned to it on interstate shipments to a distributing point within the State, although such reshipments are in the cars in which the coal was received, does not establish such continuity of transportation as to place such reshipments outside the pale of State regulation, where the consignee paid the freight to the point of reshipment to the initial carrier, which placed the cars on an interchange track, where they were held by the consignee until sales were made. It was held in the other case⁷¹ that a stockyard company which operated a railroad system for the transportation of loaded cars to and from trunk lines centering there was a carrier subject to the Act within the definitions therein, since these cars were being handled in the course of their transportation from beyond the State where the stockyards were situated or when outbound were under consignment to points outside the State; and it was therefore held that the company in carrying on this line of business could be called upon to file its tariffs with the Commission. The attitude of the Supreme Court to-day plainly is that the question of whether the commerce is interstate or not is to be determined with respect to the actual movement in the particular case. It is undoubtedly true that the question whether commerce is interstate or intrastate must be determined by the essential character of the commerce and not by mere billing or forms of contract.⁷² But the

C. R. R. Co. of N. J., 25 I. C. C. 19;
Mixon-McClintock Co. v. St. L., I.
M. & S. Ry. Co., 25 I. C. C. 8; Jubitz
v. S. P. Co., 27 I. C. C. 44.

⁷⁰ Chicago, M. & St. P. Ry. Co. v.
Iowa, 233 U. S. 334, 34 Sup. Ct. 592.

⁷¹ United States v. Union S. Y. &

T. Co., 226 U. S. 286, 57 L. ed. 226,
33 Sup. Ct. 83.

⁷² Railroad Commission v. Worth-
ington, 225 U. S. 101, 56 L. ed. 1004,
32 Sup. Ct. Rep. 653; Texas & N. O.
R. Co. v. Sabine Tram Co., 227 U. S.
111, 57 L. ed. 442, 33 Sup. Ct. Rep.

fact that commodities received on interstate shipments are reshipped by the consignees, in the cars in which they are received, to other points of destination, does not necessarily establish a continuity of movement.⁷³

§ 139. Device to break through shipment.

The Act explicitly forbids any attempt by any device to break the continuity of an interstate shipment. If the transporting of goods or passengers to an ultimate destination in another State has started, interstate commerce has begun; and no device to break up the transit into intrastate portions will affect its real nature. The continuity of the carriage of freight over a line formed by two or more roads is not broken in fact and cannot be broken in law by the charge of a local rate by one or more of such roads as its proportion of the through rate; nor can the obligations imposed by the statute be evaded by the demand of the local charge for the haul over its own road by one or more of such carriers, or by the declaration on the part of one or more of said carriers, that as to the transportation over its road it is a local and not a through carrier.⁷⁴ Where transportation of goods destined for a point without the State has been actually begun, temporary stoppage within the State, without the intention of abandoning the original movement will not deprive the transportation of the character of interstate commerce. There is a tendency plainly to be seen in the recent cases to hold that the literal reading of the bills of lading is not conclusive; and if in fact the goods are moving in interstate or foreign commerce the Act applies to them and

220; *Railroad Commission v. Texas & P. R. Co.*, 229 U. S. 336, 57 L. ed. 1215, 33 Sup. Ct. Rep. 837.

⁷³ *Gulf, C. & S. F. R. Co. v. Texas*, 204 U. S. 403, 51 L. ed. 540, 27 Sup. Ct. Rep. 360; *Railroad Commission v. Worthington*, 225 U. S. 101, 109, 56 L. ed. 1004, 1008, 32 Sup. Ct. Rep. 653; *Texas & N. O. R. Co. v.*

Sabine Tram Co., 227 U. S. 111, 129, 130, 57 L. ed. 442, 449, 450, 33 Sup. Ct. Rep. 229.

⁷⁴ *Troy Board of Trade v. Ala. Midland Ry.*, 4 Int. Com. Rep. 306, 6 I. C. C. Rep. 1.

See also *Delaware & H. C. Co. v. Com. (Pa.)*, 2 Int. Com. Rep. 222.

the jurisdiction of the Commission attaches although at first there has been only local billing.⁷⁵

§ 140. Publishing of proportional rates.

A proportional rate is a rate which applies to a part of through transportation which is within the jurisdiction of the Commission; and in order to be recognized, generally speaking, the balance of the transportation to which the proportional rate applies must be under a rate filed with the Commission.⁷⁶ The publication of proportional rates by rail carriers and a lake steamship company covering through interstate transportation, the actual movement of traffic upon through bills of lading, and the prepayment of freight charges, necessitating an accounting between the carriers, is evidence of a common arrangement for a continuous carriage.⁷⁷ Previous to the Panama Act, giving the Commission power to fix port proportionals, the Commission was reluctant on its own initiative to establish a proportional rate applicable to traffic from the Atlantic seaboard, which is lower than a reasonable local rate. But the Commission had held that part of a continuous haul from a foreign country which is confined to a rail transportation from a port of entry to a point in the same State is within the jurisdiction of the Commission, though the shipment does not move under through billing nor do the water and rail lines operate under any common control or management.⁷⁸ In another case the Commission considered its jurisdiction doubtful over part of cargo from foreign country, coming in chartered vessel without ocean billing to domestic port, and carried thence by rail to point in same State.⁷⁹ In a recent case in the Supreme

⁷⁵ See *R. R. Comm. of La. v. Texas & P. Ry.*, 229 U. S. 336, 57 L. ed. 1215, 33 Sup. Ct. 9; and *Duluth-Superior Milling Co. v. No. Pacific Ry.*, 152 U. S. 341, 146 N. W. 1105.

⁷⁶ *Crescent Coal & Mining Co. v. C. & E. I. R. R.*, 24 I. C. C. 149.

⁷⁷ *Flour City S. S. Co. v. L. V. R. R.*, 24 I. C. C. 179.

⁷⁸ *In re Rates of the Louisiana Ry. & Nav. Co.*, 22 I. C. C. 558.

⁷⁹ *Du Pont de Nemours Powder Co. v. P. R. R.*, 27 I. C. C. 59.

Court of the United States,⁸⁰ it was pointed out that, notwithstanding the fact that under the Act as it then stood the Interstate Commerce Commission had been apparently given no power by Congress to deal with port proportional rates from a point within a State to a point of shipment within that State, the Railroad Commission of that State had not in such a case, authority which could constitutionally be given it to fix such a part of a through rate for a transit which was essentially interstate.

§ 141. Transit privileges under through arrangements.

An article remains an article of interstate commerce as long as it is subject to a transit tariff.⁸¹ These privileges are only applicable to shipments intended from the outset to be through shipments. Thus in one proceeding before the Interstate Commerce Commission,⁸² it appeared that the practice was to ship grain from points west of Kansas City to Kansas City upon the local rate. When this rate was paid an expense bill was delivered to the person paying it. If this expense bill was afterward delivered to a carrier leading eastward from Kansas City, that carrier would transport a corresponding amount of grain forward to Chicago, or any eastern point, not at the rate from Kansas City, but at the balance of the through rate from the original point of shipment. It was not at all requisite that this second lot of grain should be the original lot. Of this scheme the Interstate Commerce Commission said: "The first question arising upon these facts would seem to be, Were the shipments under this practice through shipments, and for that reason entitled to the through rate which they received? It is difficult to understand how they can be so treated. Apparently they had not a single incident of a through shipment, but upon the contrary the

⁸⁰ *Railroad Commission of Ohio v. Worthington*, 225 U. S. 101, 32 Sup. Ct. 653; see also *Pittsburgh Vein Operators v. So. Pac. Ry.*, 24 I. C. C. 280.

⁸¹ *The Transit Case*, 24 I. C. C. 340.

⁸² *In the Matter of Alleged Unlawful Rates*, 7 I. C. C. Rep. 240.

transportation from the point of origin to Kansas City was in every respect local. The rate was local. There was nothing upon any paper connected with the transaction which indicated that the grain was to be carried beyond Kansas City. As a matter of fact there was no definite purpose upon the part of its owner to carry it beyond. If it did finally go further, there was no present idea as to what point it would go. It might be consumed at Kansas City. It might be sent forward to Chicago. It might be transported to Liverpool. The object of the owner of the grain was simply to take it to Kansas City for the purpose of disposing of it there, without any thought as to its ultimate destination. When the grain was unloaded and put upon the market at Kansas City, it was not, in any possible construction, there temporarily in transit upon a through shipment. It had reached its destination. It had become Kansas City grain. When it was shipped out it must take the Kansas City rate, and the fact that it had come from a point farther west was no reason for giving it a different rate."

Topic D. Conflict between Federal and State Jurisdiction

§ 142. Power of Congress to regulate.

The regulation of interstate and foreign commerce is one of the principal powers confided by the Constitution to the Congress of the nation. That this power carries with it the right to exercise it in all appropriate ways would seem to be unquestionable.⁸³ In one of the first cases,⁸⁴ under the Interstate Commerce Act Mr. Justice Brewer said of the legislative power of Congress to regulate rates: "There were three obvious and dissimilar courses open for consideration. Congress might itself prescribe the rates; or it might commit to some subor-

⁸³ Chesapeake & P. Telephone Co. v. Manning, 186 U. S. 238, 46 L. ed. 1144, 22 Sup. Ct. 881.

⁸⁴ Interstate Com. Comm. v. Cin-

cinnati, N. O. & T. P. Ry. Co., 167 U. S. 479, 42 L. ed. 243, 17 Sup. Ct. 896.

dinate tribunal this duty; or it might leave with the companies the right to fix rates subject to regulations and conditions." There would therefore seem to be no doubt that Congress possesses the inherent right which every legislature having power has, either to fix rates itself or give to its commission power in the premises. Thus far it has wisely refused to fix rates itself; and it has with equal wisdom withheld from the Commission the power to make schedules of rates. By its persistent policy it has given the Commission only power to give relief from unreasonable rates in particular cases calling for its action. The first grant of power in this regard was held by the courts to go no further than to authorize the Commission to declare the rate complained of improper.⁸⁵ But in the latest legislation the Commission is given power in giving relief to designate what the proper rate shall be henceforth.⁸⁶

§ 143. Effect of action by Congress.

Whatever doubts there may be as to the extent to which State regulation of interstate commerce may go in the absence of federal regulation, there is no doubt as to the fate of State regulation of the conduct of interstate commerce which comes in conflict with federal regulation. Thus State legislation forbidding the charging of more for a short haul than for a long haul can have no application to interstate rates in view of the express provisions of the Interstate Commerce Act as to this matter.⁸⁷ So a State statute providing for redress for those charged more than the scheduled rates is certainly without force as to charges for interstate shipments in view of the similar provision of the Interstate Commerce Act.⁸⁸ But

⁸⁵ Cincinnati, N. O. & T. P. Ry. Co. v. Interstate Com. Comm., 162 U. S. 184, 40 L. ed. 935, 16 Sup. Ct. 700.

⁸⁶ See Railroad Commission Cases, 116 U. S. 307, 29 L. ed. 636.

⁸⁷ Louisville & N. Ry. Co. v. Eu- bank, 184 U. S. 27, 46 L. ed. 416, 22 Sup. Ct. 277.

⁸⁸ Gulf, C. & S. F. Ry. Co. v. Hefley, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. 802.

Congress cannot go so far in regulation of the conduct of interstate commerce as to invade the power of the States over matters within their jurisdiction. Thus Congress cannot go the length of subjecting all employees of carriers having an interstate business to the rules which it may attempt to lay down, as was held in the first Employers' Liability Cases under the first law.⁸⁹ But since the Second Employers' Liability Cases under the present law, it has been recognized that Congress may make special rules applicable to employees actually engaged at the time in service connected with an interstate movement of traffic.⁹⁰

§ 144. Jurisdiction of State and nation.

When we come to deal with the constitutional complications due to our federal government, too wide a field is opened for anything but reference here. It is generally laid down that for normal cases the rule is as simple as that there would be federal regulation for interstate matters and state regulation of intrastate affairs. Thus a State cannot make provision by statute for redress for a refusal made to a shipper by a carrier where the cars desired were for an interstate shipment.⁹¹ And correspondingly the State cannot make regulations relating to the delivery of cars which are moving under a consignment in interstate commerce.⁹² It has recently been established by a succession of cases that since the Carmack Amendment to the Act has laid down rules for limitation of liability for loss of shipment, all State regulations of every

⁸⁹ See *The Employers' Liability Cases*, 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. 141.

See *Butts v. M. & M. Transp. Co.*, 230 U. S. 126, 31 Sup. Ct. 118, holding that the Civil Rights Act is not left applicable upon the high seas.

⁹⁰ See *Illinois C. Ry. v. Behrends*, 233 U. S. 473, 34 Sup. Ct. 646.

See *El Paso & B. Ry. v. Gutier-*

rez, 215 U. S. 587, 29 Sup. Ct. 250, holding that the Employers' Liability Act remained effective in the territories.

⁹¹ *Houston & T. C. Ry. v. Mayes*, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. 491.

⁹² *Chicago, R. I. & P. Ry. v. Hardwick F. El. Co.*, 226 U. S. 426, 57 L. ed. 284, 33 Sup. Ct. 174.

sort, even an explicit statute apparently generally applicable, can have no longer any application to interstate shipments.⁹³ Indeed, a recent case⁹⁴ goes so far as to hold that a regulation contained in the published tariffs of an interstate railway carrier on file with the Interstate Commerce Commission, limiting its baggage liability to \$100 unless a greater value is declared and stipulated by the owner and the excess charges paid, is binding upon the passenger in case of loss of the baggage through the carrier's negligence, regardless of the passenger's lack of knowledge of or assent to such regulation. This means that when Congress, by the Amendment took possession of this phase of the interstate railway transportation of property, all State rules whatsoever relating thereto were automatically set aside.

§ 145. Division of jurisdiction normally.

Two recent decisions in the Supreme Court of the United States will serve to show how closely the lines of this distinction are drawn. In one of them⁹⁵ it was held that a municipal ordinance requiring a local license to be obtained as a condition precedent to conducting an express business within the municipality should be construed, in the absence of a controlling decision of the courts of the State, as not applicable to the transaction by an express company of its interstate business, since, construed otherwise, the ordinance would be invalid as an unconstitutional regulation of commerce. In the other⁹⁶ it was held that a State may fix reasonable rates for ferriage from its shore to the shore of another State over a boundary stream, until Congress undertakes to regulate such rates; and that, therefore, State regulation of the rates to be charged

⁹³ *Chicago, R. I. & P. Ry. v. Cramer*, 232 U. S. 490, 34 Sup. Ct. 383.

⁹⁴ *Boston & M. R. R. v. Hooker*, 233 U. S. 97, 34 Sup. Ct. 526.

⁹⁵ *Barrett v. New York*, 232 U. S.

14, 34 Sup. Ct. 203, and note cases cited.

⁹⁶ *Port Richmond & B. P. Ferry Co. v. Board of Freeholders*, 234 U. S. 317, 34 Sup. Ct. 821; and note cases cited.

for a ticket for a round trip over an interstate ferry from the shore of such State to the shore of another State, and return, is valid until Congress undertakes to regulate such rates. By way of further contrast two State cases may be cited. In one of them⁹⁷ it was said that the decisions of the United States courts and the opinions of the Interstate Commerce Commission construing the Act to Regulate Commerce have no application to intrastate shipments. In the other⁹⁸ the fundamental principle was reiterated that a contract between a shipper and a railroad company for the carriage of goods from a point within one State to a point within another State is interstate commerce, and not the subject of State regulation as to tolls or compensation.

§ 146. Application of regulating statutes.

Where a statute may have two interpretations, one unconstitutional, and the other valid, one applying to all commerce, the other simply to intrastate commerce, the latter will be upheld.⁹⁹ Thus State statutes and rulings of State railroad commissioners are not applicable to interstate shipments.¹ And provisions against railroad companies for overcharges and unjust discrimination in the shipment of freight, have no application to interstate commerce.² The penalties provided by the State authorities for wrongs by carriers cannot apply to interstate shipments.³ The deduction will be absolute that the legislature of a State intended by the commission act which it has passed to regulate only intrastate traffic, and did not intend to enter the domain of interstate regulation in violation of the commerce clause of the national Con-

⁹⁷ *Alabama G. S. Ry. Co. v. McClesky*, 160 Ala. 630, 49 So. 433.

⁹⁸ *Jennings v. Big Sandy & C. Ry. Co.*, 61 W. Va. 664, 57 S. E. 272.

⁹⁹ *Darlington Lumber Co. v. Mo. Pac. Ry.*, 216 Mo. 658, 116 S. W. 530.

¹ *Greason v. Ry.*, 112 Mo. App. 116, 86 S. W. 722.

² *Wright v. Howe* (Tex. Civ. App.), 24 S. W. 314.

³ *Lowe v. Seaboard A. L. Ry. Co.*, 63 S. C. 248, 41 S. E. 297.

stitution.⁴ Therefore, a provision for free time for unloading and loading in a State statute does not apply to interstate traffic.⁵ And a penalty for not surrendering freight after tender of charges cannot apply to interstate shipments.⁶ On the other hand, a State penalty for failure to notify has been upheld by a State court as applicable to interstate shipments.⁷ And, wherever the interests of the State may be said to be peculiarly affected, its legislation will stand in the absence of explicit action by Congress bearing upon the subject. Thus a State may still regulate the size of train crews.⁸ And, since there is not enough to show that Congress has any idea of leaving the matter without regulation, the State may request the payment of wages.⁹

§ 147. Respective powers over service.

It is beyond the jurisdiction of a State, as the Supreme Court of the United States has often pointed out, to enforce the performance of transportation for those desirous of shipping beyond the State.¹⁰ But apparently a State commission may order service to be maintained to and from the State line, although there is no station there, and train movements will necessarily be to and from a junction point beyond the State line.¹¹ A State body has no jurisdiction to determine whether an express company shall, as to interstate shipments, deliver packages to the residences and places of business of consignees.¹² And by a like course of reasoning it will be apparent

⁴ *Oregon R. & Nav. Co. v. Campbell*, 173 Fed. 980.

⁵ *St. Louis & S. F. Ry. v. State*, 26 Okla. 62, 107 Pac. 929, 30 L. R. A. (N. S.) 137.

⁶ *Trinity & B. V. Ry. Co. v. Geppert* (Tex. Civ. App.), 135 S. W. 164.

⁷ *St. Louis, I. M. & S. Ry. v. Edwards*, 94 Ark. 394, 127 S. W. 713.

⁸ *Pittsburg, C., C. & St. L. Ry. v. State*, 172 Ind. 147, 87 N. E. 1034.

⁹ *State v. Missouri Pac. Ry. (Mo.)*, 147 S. W. 118.

¹⁰ *Southern Ry. v. Reid*, 222 U. S. 424, 32 Sup. Ct. 140, and cases cited.

¹¹ *Missouri Pacific R. R. v. Kansas*, 216 U. S. 262, 54 L. ed. 472, 30 Sup. Ct. 330.

¹² *State v. Adams Exp. Co.*, 171 Ind. 138, 144, 85 N. E. 337.

that a State cannot penalize the failure to deliver a telegraph message sent from one State to another.¹³ It has been held that a State may require an interstate carrier to settle claims promptly.¹⁴ But a State may not increase the liabilities of an initial carrier engaged in interstate commerce.¹⁵ However, a State reciprocal demurrage law has been held by another State to be generally applicable.¹⁶ In still another State, it has been held within the power of the State to penalize delay in performing service.¹⁷ But these and other cases of the same sort, where it is insisted that an intent of Congress to occupy the whole field so as to exclude the State must appear, are clearly open to question in view of the present tendencies observable in the decisions of the Supreme Court of the United States.

§ 148. Legislation relating to facilities.

There seems to be no doubt that a State Commission may as to local movements compel switching to be done on a basis established by it.¹⁸ It is possible that this may be done, although the car is destined to another State, if the purposes of such order are to prevent discrimination among shippers in local switching service.¹⁹ Likewise, a State commission has power to order the construction of an interchange track to connect railroad lines for the exchange of all kinds of traffic, both interstate and intrastate, the purpose being to provide better facilities for railroad service in general.²⁰ Although the Act now provides that the Commission can order switch connections, State bodies duly empowered may still order the making

¹³ *Western U. Tel. Co. v. Pendleton*, 122 U. S. 347, 30 L. ed. 1187.

¹⁴ *Atlantic C. L. Ry. Co. v. Mazursky*, 216 U. S. 122, 30 Sup. Ct. 378.

¹⁵ *Central of Ga. Ry. Co. v. Murphey*, 197 U. S. 194, 49 L. ed. 444, 25 Sup. Ct. 218.

¹⁶ *Martin v. Oregon Ry. & N. Co.*, 58 Oregon, 198, 113 Pac. 16.

¹⁷ *Traynham v. Charleston & W. C. Ry.* (S. C.), 71 S. E. 813.

¹⁸ *Louisville & W. R. R. v. Higden*, 234 U. S. 592, 34 Sup. Ct. 948.

¹⁹ *Texas & P. R. R. v. Railroad Commission*, 183 Fed. 1005.

²⁰ *Pittsburgh, C., C. & St. L. Ry. v. State ex rel.*, 171 Ind. 189, 86 N. E. 328.

of such connections.²¹ But a State railroad commission cannot prescribe rules or assume powers not conferred upon it; and the statute should not be held to apply to terminal facilities or transportation in shipment of interstate commerce.²² A State has power to impose regulations on railroads within the State, requiring interchange of cars with another road subsequent to the arrival of the train at the "break-up yards."²³

§ 149. State legislation burdening interstate commerce.

If certain cases only are examined it would seem that State statutes which restrict the conduct of interstate transportation in any substantial degree are unconstitutional, the absence of congressional regulation on the subject being held equivalent to a declaration that the matter should be left undisturbed. Thus a State statute forbidding the separation of travelers has been held void as applied to interstate transportation.²⁴ But it follows that as the matter is to be left without legislative interference a carrier may make proper regulations separating white passengers from black, which may apply to interstate commerce.²⁵ A State statute directed against all discrimination in freight rates has been held unconstitutional, so far as its application to interstate shipments is concerned.²⁶ But it has been said recently in one case that where the

²¹ See *Kansas City So. Ry. v. Kaw Valley Dist.*, 233 U. S. 75, 34 Sup. Ct. 181, holding that a State body cannot order the removal of an interstate bridge.

²² But rates fixed by a State for transportation therein can have no application to shipments moving through, even as part of a combination rate. *Oregon R. R. & N. Co. v. Campbell*, 230 U. S. 525, 33 Sup. Ct. 22.

²³ *Louisville & N. R. R. Co. v. Central S. Y. Co.*, 133 Ky. 149, 97 S. W. 778.

²⁴ *Hail v. Decuir*, 95 U. S. 485, 24 L. ed. 547.

But see *Alabama & V. Ry. v. Morris*, 103 Miss. 511, 60 So. 11, holding that a State may require separation as a police measure.

²⁵ *Chiles v. Chesapeake & O. R. R. Co.*, 218 U. S. 71, 30 Sup. Ct. 667.

See *Hart v. State*, 100 Md. 595, 85 Atl. 497, holding that for the States to require separation would invade federal jurisdiction.

²⁶ *Wabash, St. L. & P. Ry. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244.

Commission has defined certain acts as discriminatory, the State authorities may declare still others to be discriminatory also.²⁷ There have been doubts as to the extent to which a State can regulate the stopping of interstate trains. It was at first said that the State could order this to be done.²⁸ But it is now well established that this cannot be done by the authorities of the State, if the company provides an adequate local service.²⁹ It apparently has once been said that a State can provide redress for failure to forward a message; but that case was decided before the Commission had been given jurisdiction over telegraphing between the States, and the rule would now be different.³⁰

§ 150. Extent of the federal supervision.

Two recent cases in the Supreme Court of the United States throw light upon these difficult distinctions. In one of them³¹ it was held that the federal courts will not disturb, on the theory of any interference with interstate commerce, an order of a State railroad commission suspending an interstate railway company's supplemental tariff in order to give the commission an opportunity to investigate, since it seems that Congress has not so

²⁷ *Puritan Coal Mining Co. v. Penna. Ry.*, 237 Pa. St. 420, 85 Atl. 426.

²⁸ *Lake Shore & M. S. Ry. Co. v. Ohio*, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. 465. This case was virtually overruled by *Cleveland, C., C. & St. L. R. R. Co. v. Illinois*, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. 722.

²⁹ See the latest cases on this point: *Atlantic C. L. R. R. Co. v. Wharton et al.*, 207 U. S. 328, 52 L. ed. 230, 28 Sup. Ct. 121; *Herndon v. Chicago, R. I. & P. R. R. Co.*, 218 U. S. 135, 30 Sup. Ct. 633.

³⁰ Compare *Western U. T. Co. v.*

James, 162 U. S. 650, 48 L. ed. 1105, 16 Sup. Ct. 950, with *H. B. Williams Co. v. Western U. T. Co.*, 203 Fed. 140.

³¹ *Grand Trunk Ry. Co. v. Michigan Railroad Commission*, 231 U. S. 457, 34 Sup. Ct. 152.

The position of the Commission is that since cartage charges may be regarded as a proper subject for national regulation, federal authority over demurrage and track storage charges in connection with interstate commerce cannot be challenged and is excluded. *Wilson Produce Co. v. Pa. Ry.*, 14 I. C. C. 170.

taken over the whole subject of terminals, team tracks, switching tracks, and sidings, of interstate railways, as to invalidate all State regulations relative to the interchange of traffic. On the other hand where a line haul is terminating in a delivery involving switching, it was held in the later case³² that the question whether there is at any point an additional service performed by the carrier in the receipt and delivery on industrial spur tracks within the switching limits in a city of carload freight moving in interstate commerce, upon which such carrier may base an extra charge, in addition to the line-haul rate to or from such city, or whether there is merely a substituted service which is substantially a like service to that included in the line-haul rate, and not received, is a question of fact to be determined according to the actual conditions of operation, and one upon which it is manifestly the province of the Interstate Commerce Commission to pass.

§ 151. Scope for State police power.

It will have been noticed that the problem is how far the conduct of interstate commerce should be left subject to the same law throughout the Union without disturbance by local law, and how far the police power of the State may be exercised by general legislation applying to the conduct of interstate commerce as well as to all things done within its borders. Thus a State may prohibit a railway from receiving even for interstate shipment hides not duly inspected to prevent fraudulent shipment of branded skins, because of the peculiar necessity for such policy in those regions.³³ And a State may by

³² *Interstate Commerce Commission v. Atchison, T. & S. F. Ry.*, 234 U. S. 294, 34 Sup. Ct. 814.

The position of the Commission is that when under tariffs, carriers agree to switch, upon order of consignee, the transportation service to be performed by the carrier is not ended until cars are given terminal

delivery directed by consignees, and it follows that switching service does not constitute a local transaction, but interstate commerce. *Badenoch Co. v. Chicago & N. W. Ry.*, 22 I. C. C. 36.

³³ *New Mexico ex rel. v. Denver & R. G. R. R. Co.*, 203 U. S. 38, 51 L. ed. 78, 27 Sup. Ct. 1.

general law prohibit running of freight trains interstate as well as intrastate on Sunday, this statute governing the conduct of all within the jurisdiction.³⁴ To safeguard its citizens a State may require that all locomotive engineers operating trains within its borders shall be examined and licensed.³⁵ Likewise a State may require all locomotives to be equipped with electric headlights of high power.³⁶ And it may make rules for safety appliances generally applicable to all cars moving within its borders.³⁷ Perhaps the State may go to this length in the exercise of the police power strictly in regulating service. Thus a State may regulate the heating of cars, those upon interstate trains as well as others.³⁸

³⁴ *Hennington v. Georgia*, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. 1086. *Georgia*, 234 U. S. 280, 34 Sup. Ct. 829.

³⁵ *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508. ³⁷ *Luken v. Lake S. & M. S. Ry.*, 248 Ill. 377, 94 N. E. 175.

³⁶ *Atlantic Coast Line R. R. v. New York, N. H. & H. R. R. Co.*, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. 418.

CHAPTER IV

SERVICES SUBJECT

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§ 160] RAILROAD RATE REGULATION

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§ 160. Provisions of the Act.

By section 1 of the Act as it now reads the jurisdiction of the Commission covers any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water; telegraph, telephone and cable companies (whether wire or wireless); and any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment). The term "common carrier" as used in the Act shall include express companies and sleeping-car companies. The term "railroad" as used in this Act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal

facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property; and the term "transportation" shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The extent of the powers of the Commission over the rendering of service as the Act now stands is more fully set forth in Chapter XIX.

§ 161. Continual extension of jurisdiction.

The service subject to the original Act to Regulate Commerce of 1887 was primarily railroad transportation. Water carriers were included only in so far as they were in concurrence with a rail line under a common management. As the original Act of 1887 read it only covered interstate and carriers by railroad, or partly by railroad and partly by water when both are used under a common control, management or arrangement for a continuous carriage or shipment. The parenthesis was not put around the latter clause until the revision of 1906; and at the same time power was given to the Commission to establish joint rates between carriers by land or sea who are actually engaged in carrying by rail and water in commerce moving between States. Pipe lines, express services and sleeping cars were added to the services subject to the Act in 1906. Telegraph, telephone and cable companies, whether wire or wireless, were put under the jurisdiction of the Commission in 1910. Services incidental to transportation were more elaborately enumerated in 1906; and jurisdiction over allowances for them more particularly covered in 1910. By the Panama Act of 1912, further jurisdiction

was given the Commission over water lines, not, however, going to the extent of making subject to the Commission vessels carrying from port to port without connection with rail lines.

Topic A. Callings Subject

§ 162. Railroads.

The cases at law defining the public character of railroad transportation are so numerous that it is difficult to select any one in particular as an illustration. "It is now too well settled in this State to admit of questioning, that railroad companies are common carriers, and as such, that they are amenable to the liabilities imposed by the law applicable to common carriers as the same is administered in this State."³⁹ But this is applicable only to such railroads as make it a business to carry for the public. "A logging railroad appurtenant to a saw-mill, constructed wholly on private grounds and operated for private purposes is not a common carrier charged with all the duties and responsibilities incumbent by the laws of the land upon common carriers."⁴⁰ As the original Act to Regulate Commerce was primarily designed to bring railroad transportation under the intimate control of the federal government, the Commission established thereby has never had any question of the character of the business of a railroad engaged in carrying between the States. The Commission has always recognized that it is dealing with a business essentially monopolistic in character, wherein without regulation of rates by the Government there would not naturally be a sufficient regulation by the process of competition.⁴¹ The Commission also has had little difficulty in determining what a railroad is; but there is no necessity for it to make nice distinctions as to what

³⁹ *Southwestern Railroad Co. v. Webb*, 48 Ala. 585. *ber Co.*, 74 Fed. 517, 20 C. C. A. 515, 41 U. S. App. 45.

⁴⁰ *Wade v. Critcher & M. C. Lum-* ⁴¹ *Advance in Rates—Eastern Case*, 20 I. C. C. 243.

constitutes carriage strictly as distinguished from other services, as everything ancillary to the provision of transportation is specifically put under its jurisdiction as well as the carriage itself. However, once in a while the question comes up as to when transportation by rail in this general sense has finally come to an end, by the employment thereafter in handling the traffic of other facilities of a different character.⁴²

§ 163. Water lines.

As the main purpose of the Act was to regulate transportation by railroad, the regulation of water lines was merely incidental and collateral.⁴³ Water carriers were not subjected to the control of the Commission, because it was believed that their rates were largely dictated by competition, and it was understood that freedom to quote such rates as they found necessary from day to day, was essential to the carrying on of this commerce to best effect.⁴⁴ This has not always proved to be the case; the Commission has found for instance that water transportation between the Atlantic seaboard and Galveston has never been open to free competition.⁴⁵ It should be noted in this connection that it has recently been held in a State court that the rates of a steamship company plying on the high seas between two ports in the same State are subject to the jurisdiction of the State Commission.⁴⁶ Water carriage is not as yet subject to the jurisdiction of the Commission at Washington. As has been seen, only when there is a rail and water route established by some common arrangement is there any service subject to the

⁴² *Kansas City v. Kansas City V. & T. Co.*, 24 I. C. C. 22.

⁴³ *In re Jurisdiction over Water Carriers*, 15 I. C. C. 205.

⁴⁴ *Cosmopolitan S. S. Co. v. Hamburg American S. P. Co.*, 13 I. C. C. 266.

⁴⁵ *Southwestern Shippers Traffic*

Asso. v. A., T. & S. F. Ry. Co., 24 I. C. C. 570.

⁴⁶ *Wilmington Transp. Co. v. Railroad Commission (Cal.)*, 137 Pac. 135, aff. U. S. Sup. Ct. Feb. 1, 1915. Compare *United States v. Pacific Ry. & N. Co.*, 228 U. S. 87, 57 L. ed. 742, 33 Sup. Ct. 443.

Act.⁴⁷ Even so, a water carrier, by engaging in interstate transportation with a railroad, does not subject its all-water business to the jurisdiction of the Commission.⁴⁸ The Commission, to be sure, may now force the establishment of through routes where one of the parties is a water line.⁴⁹ But it is doubtful whether the jurisdiction of the Commission to establish through routes can be exercised except over carriers subjecting themselves to the Act.⁵⁰ The Commission may pass upon the propriety of whatever rail and water rates are filled with it, but only such rates.⁵¹ But rates once established may subsequently be cancelled, if there is a *bona fide* withdrawal from the arrangement under which they were offered.⁵²

§ 164. Passenger transportation.

The pack carriers of mediæval times concerned themselves only with goods; it was not until the day of the stagecoach that the carriage of passengers became a practice. It is needless to state that our railways to-day are in general public carriers of passengers as well as common carriers of goods. Examples, however, will occur where a railway has confined its carriage to the carriage of goods only; and in such case it cannot be called upon to take passengers.⁵³ On the other hand, if the railroad is operating as a carrier of freight only, it need not run trains for passengers.⁵⁴ But the usual fact is that the railroad in question has undertaken to carry passengers as well as

⁴⁷ *Mutual Tr. Co. v. United States*, 178 Fed. 664.

⁴⁸ *Augusta & Savannah Steamboat Co. v. O. S. S. Co. of Savannah*, 26 I. C. C. 380.

⁴⁹ *Murray L. & T. Co. v. D. & H. Co.*, 25 I. C. C. 388; see also *Milwaukee P. & F. Exch. v. Crosby Transp. Co.*, 30 I. C. C. 653.

⁵⁰ *Aransas P. C. & D. Co. v. G. H. & S. A. Ry. Co.*, 27 I. C. C. 403.

⁵¹ *Echols & Co. v. A., T. & S. F. Ry.*

Co., 26 I. C. C. 110; see also *Southwestern Shippers Traffic Asso. v. A., T. & S. F. Ry. Co.*, 24 I. C. C. 570.

⁵² *Lumber from Louisiana to North Atlantic points*, 27 I. C. C. 186; see also *Milburn Wagon Co. v. Lake Shore & M. S. Ry. Co.*, 18 I. C. C. 144.

⁵³ *Wiggins Ferry Co. v. East St. L. V. Ry.*, 107 Ill. 450.

⁵⁴ *Commonwealth v. Fitchburg R. Co.*, 12 Gray, 180.

goods.⁵⁵ And then it is bound as a public carrier, when not overcrowded, to take all proper persons who may apply for transportation over its line, on their complying with reasonable rules of the company.⁵⁶ It has never been questioned in the Commission that the provisions of the Act are as explicit as to its application to the carriage of passengers as to the transportation of goods.⁵⁷ And it has been held in the courts that a carrier of passengers is as much subject to the Act as a carrier of goods.⁵⁸

§ 165. Street railways.

The Commission from the first maintained that street railways carrying passengers from one State to another were within the provisions of the Act; and it frequently asserted this jurisdiction over railways of this sort, whatever the character of their service.⁵⁹ However, the Supreme Court has recently held that a street railway running across an interstate bridge, and exclusively engaged in carrying passengers, is not within the scope of the word "railroad" used in the Act, as the Commission was designed to deal with the railroad which plays a part in commerce between States, not with the railway which has no real function in such business.⁶⁰ The Act, it should be noted, makes no distinction between railroads that are operated by electricity and those that use steam locomotives; both are subject to its provisions when engaged in interstate transportation, and are entitled to equal consideration in any controversy before the Commission.⁶¹

⁵⁵ *Caldwell v. Richmond & D. R. Co.*, 89 Ga. 550, 15 S. E. 678.

⁵⁶ *Galena & C. Y. R. R. Co. v. Yarwood*, 15 Ill. 468.

⁵⁷ *West End Improvement Co. v. T. C. B. Ry. & B. Co.*, 17 I. C. C. 239.

⁵⁸ *Louisville, N. O. & T. T. R. R. v. State*, 66 Miss. 662, 6 So. 203, 2 Int. Com. Rep. 18.

⁵⁹ *Willson v. R. C. R. R.*, 7 I. C. C. Rep. 83; *Citizens of Somerset v.*

Washington Ry. & Elec. Co., 22 I. C. C. R. 187; *Boyle v. G. F. & O. D. R. R. Co.*, 20 I. C. C. R. 232; *Kansas City v. K. C. V. & T. Ry. Co.*, 24 I. C. C. 22; *Bitzer v. W. V. Ry. Co.*, 24 I. C. C. 255; *Ford v. W. V. Ry. Co.*, 24 I. C. C. 632.

⁶⁰ *Omaha & C. B. St. Ry. Co. v. Int. Com. Comm.*, 230 U. S. 324, 33 Sup. Ct. 890.

⁶¹ *Chicago & M. Elec. R. Co. v. Illinois C. R. Co.*, 11 I. C. C. 20.

It would seem, therefore, that it is not motive power which is conclusive, but the character of the line in question, and it would follow that interurban lines of a commercial character are common carriers subject to the act.⁶² It is the duty of such roads to provide cars and all other facilities necessary to properly serve the public; and through routes and joint rates may now be established over them.⁶³ But it is plainly the provision of the Act, as it now reads, that through routes and joint arrangements may not be required between a steam road and an electric railway that does not transport freight as well as passengers.⁶⁴

§ 166. Express companies.

Express companies are peculiarly an American institution, which has flourished under the decisions of the courts to the effect that the railroad can make exclusive arrangements with the expressman of their choice; and since they live by the grace of the railroads, their existence can properly be justified only to the extent that their service is more efficient and more reasonable than that which would be given by the railroads themselves. And according to the way the Commission views their function, the express companies are agencies of the railroad for doing a small parcel business, to be treated as freight forwarders by passenger train, giving supplemental service and intermediate care.⁶⁵ Express service is desired because shipments to smaller communities are not of sufficient size to warrant movement in carload quantities; and freight service is too slow except where package cars are run.⁶⁶ The main object of an express service is expedition; and express rates should not be so low as to attract busi-

⁶² Louisville Board of Trade v. O. S. W. R. R. Co., 20 I. C. C. I. C. & S. T. Co., 27 I. C. C. 499. 486.

⁶³ St. Louis, S. & P. R. R. v. P. & P. U. Ry. Co., 26 I. C. C. 226.

⁶⁴ Cincinnati & C. T. Co. v. B. &

⁶⁵ The Express Cases, 117 U. S. 1, 29 L. ed. 791, 6 Sup. Ct. 542.

⁶⁶ In re Express Rates, 24 I. C. C. 380.

ness which might properly go by freight, and thereby congest and interfere with the service by express.⁶⁷ Under the Act as it originally read, confined primarily to railroad service, only an express business conducted by a railroad company was held subject to its provisions.⁶⁸ Independent express companies were not made subject to the Commission until the amendment of 1906; but they are now as fully subject to the Act as any of the carriers therein defined.⁶⁹ That expressmen are responsible as carriers, not merely as forwarders was settled long ago—not, however, until after much litigation.⁷⁰

§ 167. Sleeping-car companies.

Following the analogy of express service the courts have held that the railroads may make exclusive arrangements with one company for the provision of sleeping cars.⁷¹ But the parallelism is not perfect; for, although the express company is held a carrier of goods, the sleeping-car company is not a carrier of passengers. It provides, to be sure a vehicle for passengers to ride in, and accommodations for their comfort while in course of transportation. But the railroad company and not the car company undertakes and is responsible for the transportation, and has entire charge of the journey. Although not a common carrier, the sleeping-car company is in a public employment.⁷² Sleeping-car service when provided by separate companies was first made subject to the Commission in 1906. If the railroad was itself providing the sleeping cars, its rates might be subject to the jurisdiction of the Commission under the original Act, but not otherwise.⁷³ Now apparently the arrangements between sleeping-car

⁶⁷ *R. R. Com'rs of Fla. v. S. Exp. Co.*, 28 I. C. C. 634.

⁶⁸ *Re Express Companies*, 1 Int. Com. Rep. 22, 1 I. C. C. 349.

⁶⁹ *Kindel v. Adams Exp. Co.*, 11 I. C. C. 475.

⁷⁰ *Buckland v. Adams Express Co.*, 97 Mass. 124, 93 Am. Dec. 68.

⁷¹ *Chicago, St. L. & N. O. R. R. v. Pullman So. Car Co.*, 39 U. S. 79, 35 L. ed. 97, 11 Sup. Ct. 490.

⁷² *Lemon v. Pullman P. Car Co.*, 52 Fed. 262.

⁷³ See *Worcester Excursion Car Co. v. Pa. Ry.*, 2 Int. Com. Rep. 792, 3 I. C. C. 577.

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companies and railroad companies as to the use of the cars and the compensation therefor are subject to the power of the Commission.⁷⁴

§ 168. Parlor-car service.

The business of running drawing-room cars in connection with ordinary passenger cars has become one of the common incidents of passenger traffic on the leading railroads of the country.⁷⁵ Parlor-car service when performed by railroads is part of the service offered in passenger transportation, and as such was plainly subject to the Act from the outset. In one early case the Commission went very fully into the parlor-car service then provided by the New York, New Haven & Hartford Railroad between Boston and New York, and made favorable findings upon the rates and practices in relation thereto.⁷⁶ Whether such service when rendered by other companies is made subject to the jurisdiction of the Commission by the amendments of 1906, which, while only specifying sleeping-car companies, spoke later generally of auxiliary services in the course of transportation by whomsoever provided might perhaps have been arguable. But at all events, the Commission has not as yet suggested that there is any difference to be respected between sleeping cars and other special cars.

§ 169. Dispatch lines.

By the doctrines prevalent in the federal courts, the railroads may make exclusive arrangements with car lines of special character, such, for example as live stock transportation companies for the carriage of cattle.⁷⁷ Therefore, the Commission held in any early decision that the railroads were under no obligation to perform without discrimination haulage for rival concerns operating stock

⁷⁴ See Corporation Commission of Oklahoma v. A., T. & S. F. Ry. Co., 25 I. C. C. 120.

⁷⁵ Thorpe v. New York C. & H. R. R. R., 76 N. Y. 407.

⁷⁶ Hewins v. New York, N. H. & H. R. R., 10 I. C. C. Rep. 221. See Pullman Co. v. Luke, 203 Fed. 1017.

⁷⁷ United States ex rel. Morris v. D., L. & W. R. R., 40 Fed. 101.

cars.⁷⁸ Freight lines operating as dispatch companies are common carriers, if they arrange for keeping possession of the freight transported en route.⁷⁹ But, if the fast freight line is in reality operated by a combination of railroads, the dealings will be held to be with the railroads themselves jointly.⁸⁰ By a practice now prevailing, fruit is carried in refrigerator cars, which are arranged to contain ice; these cars were formerly provided in small numbers by the railroads themselves; but they are now very largely owned by private corporations. Though not technically a carrier, the refrigerator car line is carrying on a business which is of public importance in connection with the railway, and like the sleeping-car company, it is, therefore, engaged in a public employment which, though not identical with that of a common carrier, is analogous to it, and imposes similar legal obligations upon the corporation.⁸¹ The same thing would, of course, be true of a tank car line; and as a matter of fact the tank car lines seem usually to be owned or controlled by outside concerns.⁸² It should be emphasized again in this connection that all services involved in the transportation of goods by rail are by the later amendments to the Act made subject to the jurisdiction of the Commission. And this is so whether the services are conducted by the railroad itself or by any other parties, so that the private cars in public service are plainly subject to the orders of the Commission.

§ 170. Pipe lines.

As amended in 1906 the Act to regulate commerce impresses the obligation of common carriers upon all pipe lines engaged in the transportation of oil in interstate com-

⁷⁸ *Burton Stock Car v. C., B. & Q. & W. R. Co.*, 119 N. C. 693, 56 Am. R. R., 1 Int. Com. Rep. 329, 1 I. C. C. St. Rep. 628, 25 S. E. 854.

⁷⁹ *Transportation Co. v. Block*, 10 I. C. C. 360.

⁸⁰ *See Re Transportation of Fruit*, 10 I. C. C. 360.

⁸¹ *See Rental Charges on Private Cars*, 31 I. C. C. 255.

⁸² *Rocky Mt. Mills v. Wilmington*

merce. It had previously been held in the courts that such pipe lines might constitutionally be given eminent domain, as tube highways open to public use.⁸³ It apparently makes no difference if the pipe lines in question were built over privately acquired right of way, and transport only their own oil; at all events, all the pipe lines carrying oil from one State to another have been considered by the Commission common carriers subject to the Act. And the United States Supreme Court has just decided that pipe lines which have never, as a matter of fact, undertaken to carry for anyone else than their owners are affected with a public interest, if the business is conducted on the basis of insisting that all comers shall sell their oil previously to its being transported to the concern which operates the system.⁸⁴ This decision is so recent that the Commission has not put into effect any policy of regulation which has as yet come up for decision.

§ 171. Telegraph lines.

When the law first had to deal with the telegraph, the disposition of the courts was to put it under the class of carriers; but it was soon seen that this technically was not correct.⁸⁵ However, it has always been recognized that telegraph lines are plainly public services, potentially subject to governmental regulation through Commission action.⁸⁶ Their business in transmitting messages equally clearly constitutes interstate commerce, for the regulation of which Congress may provide.⁸⁷ This situation was

⁸³ *West Virginia Transp. Co. v. Volcanic O. & C. Co.*, 5 W. Va. 382. "A pipe line company is a common carrier bound to receive and transport for all persons alike all goods intrusted to its care." *Giffin v. South West Pa. Pipe Lines*, 172 Pa. St. 580, 33 Atl. 578.

⁸⁴ *United States v. Ohio Oil Co.*, 234 U. S. 548, 34 Sup. Ct. 956. See also the opinions in the Commission

in the original proceedings. In *re Pipe Lines*, 24 I. C. C. 1.

⁸⁵ See the phraseology in *Western Union Telegraph Co. v. Hamilton*, 36 Tex. Civ. App. 300.

⁸⁶ See the language in *Green v. Telegraph Co.*, 136 N. C. 489, 49 S. E. 165, 67 L. R. A. 985, 103 Am. St. Rep. 955.

⁸⁷ See the theories advanced in *Western Union Telegraph Co. v.*

covered by the Mann Act of 1910 by putting telegraph and cable service (whether wire or wireless) under the jurisdiction of the Commission; and since that time it has been recognized that henceforth the regulation of these services belongs exclusively to the Commission.⁸⁸

§ 172. Telephone systems.

The demands of the commerce of the present day make the telephone a necessity. It has long been recognized that all people should have access to this service upon equal terms.⁸⁹ At one time it was insisted that as the telephone was patented its owners could do as they pleased. But it has been agreed almost from the beginning that the service provided by the telephone companies is public in character. Indeed, the best discussion of the essential nature of public calling is to be found in the series of cases brought before the courts not long ago to establish the invalidity of arrangements made by the telephone companies giving special privileges to certain telegraph companies.⁹⁰ Occasion arose some time ago to say that Congress might regulate this business where it had jurisdiction.⁹¹ Telephone service was made subject to the Act, with special provisions relating thereto, by the amendments of 1910. Since then the Commission has had occasion to deal with this service only a few times; but there have been important developments in this field recently.⁹²

§ 173. Government services.

It should be noted that the Commission has had specially conferred upon it from time to time jurisdiction over

Call Publishing Co., 181 U. S. 92, 45 L. ed. 765, 21 Sup. Ct. 561.

⁸⁹ H. B. Williams Co. v. Western U. T. Co., 203 Fed. 140.

⁹⁰ State v. Citizens' Telephone Co., 61 S. C. 83, 39 S. E. 257, 85 Am. St. Rep. 870.

⁹² See Chesapeake & P. Telephone

Co. v. Baltimore & O. Telegraph Co., 66 Md. 399, 7 Atl. 809, 59 Am. Rep. 167.

⁹¹ Chesapeake & P. Telephone Co. v. Manning, 186 U. S. 238, 46 L. ed. 1444, 22 Sup. Ct. 881.

⁹² Local Telephone Service at Pittsburgh, 27 I. C. C. 622.

the charges which the government should properly make the public in furnishing the services which it is itself providing. This is the tendency which should become a policy with the recognition of the truth that public services by whomsoever provided should be furnished upon the equitable basis to be found in legal principles. Thus the approval of the Commission is required for changes made by the Postmaster General under the Parcels Post Act.⁹³ And the tolls in certain government owned canals have been made subject to the approval of the Commission.⁹⁴ Very likely these two instances may show the beginnings of a policy. It is quite in accordance with the trend of opinion to give to the Commission more jurisdiction along these lines.

Topic B. Incidental Services

§ 174. Transfer.

By the provisions of the original Act the term railroad, whenever used, should be held to include all bridges and ferries used or operated in connection with any railroad. But the courts held that this applied to the bridges or ferries owned and operated by the railroad company subject to the Act, and not to a bridge company which supplied a roadway only, over which other companies carry, and that such a company, not being itself a carrier, was not subject to the Act.⁹⁵ Apparently the amendments of 1906 by which all instrumentalities and facilities of shipment and carriage, irrespective of ownership or arrangement, were made subject to the jurisdiction of the Commission, are not considered to have enlarged the powers of the Commission in respect to this situation, beyond such facilities as are employed in carriage subject to the Act in the course of transit between the States.⁹⁶ It was

⁹³ No. 402, June 30, 1906.

⁹⁴ No. 336, Aug. 24, 1912.

⁹⁵ *Kentucky & I. B. Co. v. L. & N. R. R.*, 37 Fed. 567, 2 L. R. A. 289, 2 Int. Com. Rep. 351, appeal

dismissed, 149 U. S. 777, 37 L. ed. 964, 13 Sup. Ct. 1048.

⁹⁶ *New York C. & H. R. R. v. Board of Hudson Co.*, 227 U. S. 248, 57 L. ed. 499, 33 Sup. Ct. 269.

recently ruled by the Commission that a bridge company with its viaduct approaches, was not a common carrier subject to the Act.⁹⁷ But where a bridge company takes the position of an intervening carrier, it will, if it participates in interstate traffic, be held subject in its rates to the jurisdiction of the Commission.⁹⁸ The reservation of Congress of the right to fix charges over bridges is exercised by a delegation of authority to the Commission.⁹⁹ Unless the circumstances are dissimilar a carrier may not arbitrarily absorb a bridge charge at one river crossing and refuse to do so at another.¹ It has, however, recently been pointed out that mere ferriage across a stream separating two states was not a matter which Congress had as yet undertaken to regulate.² As in the case of railway bridges, so in the case of car ferries, if the charge therefor is involved in the through service the Commission has jurisdiction, otherwise not.³

§ 175. Wharfage.

A railroad which terminates on navigable water in arranging to handle through traffic ought to provide proper facilities therefor. As the Commission said in a recent case, it is the duty of defendant carriers to provide facilities for receiving flour reaching Buffalo via steamship; and if their facilities are inadequate, facilities must be provided elsewhere, and at a charge no greater than would apply via their own docks.⁴ And consequently, a wharf used by another as Shagway was held to be an instrumentality of interstate commerce, in respect to the use of

⁹⁷ *Kansas City v. K. C. V. & T. Ry. Co.*, 24 I. C. C. 22. *A. & A. R. R. Co.*, 24 I. C. C. 331.

⁹⁸ *Railroad Commission of Ind. v. K. & I. B. & R. R. Co.*, 14 I. C. C. 563. ² *Port Richmond & H. Ferry Co. v. Board of Commissioners*, 234 U. S. 317, 34 Sup. Ct. 152.

⁹⁹ *West End Improvement Club v. O. & C. B. R. & B. Co.*, 17 I. C. C. 239. ³ The cost of such car ferriage was considered in *Rates on Coal to Milwaukee*, 28 I. C. C. 527.

¹ *Mfrs. & Merchants' Assoc. v. R. Co.*, 24 I. C. C. 179. ⁴ *Flour City S. S. Co. v. L. V. R.*

which discrimination would be forbidden.⁵ It all depends, with the courts, upon the situation which they find to have been established. A railroad may however, have a special wharf, especially for a particular line connecting with it; and it has been held that from such a wharf it may exclude other lines desirous of using it where, as in that case, sufficient facilities were apparently to be obtained at other wharves.⁶ But in the case of the Southern Pacific Terminal Company created by an act of the legislature for the purpose of furnishing terminal facilities at the port of Galveston for use in connection with the Southern Pacific Railroad and Steamship systems and controlled by it through stock ownership, the Supreme Court held that the Commission has jurisdiction to regulate the charges on traffic handled in connection with these carriers, since the terminal was a part of the system and was not a distinct wharfage company.⁷ Following the lines of these decisions, the Commission has recently investigated wharves maintained by carriers at Fort Myers for use of business from certain boat lines on the Caloosahatchee River.⁸ At Pensacola, also, preferences discovered in berthing vessels in connection with railroad owned wharves were held unlawful.⁹

§ 176. Terminals.

In the matter of terminals a distinction seems to be made in the law between the terminals which are part of the system of the railroad itself, and terminals which are maintained for the use of railroads entering the city.¹⁰

⁵ *Humboldt S. S. Co. v. W. P. & Y. R.*, 25 I. C. C. 136.

⁶ *Louisville & N. R. R. Co. v. West Coast N. S. Co.*, 198 U. S. 483, 49 L. ed. 1135, 25 Sup. Ct. 745.

⁷ *Southern Pac. Terminal Co. v. I. C. C.*, 219 U. S. 498, 55 L. ed. 310, 31 Sup. Ct. 278.

⁸ *R. R. Com'rs of Fla. v. A. C. L. R. R. Co.*, 28 I. C. C. 356.

⁹ *In re Wharfage Facilities at Pensacola*, 27 I. C. C. 252.

¹⁰ Concerning the obligations of public terminals, see *State v. Jacksonville Terminal Co.*, 41 Fla. 363, 27 So. 221 (Union station); and *Union Ry. of Balt. v. Canton R. R.*, 105 Md. 12, 65 Atl. 409 (belt line).

Generally speaking, while a railroad company may refuse the use of its terminals to other railroads, a terminal company must permit all railroads to use its facilities upon equal terms.¹¹ Although the terminals of a railroad are subject to the supervision of the Commission as part of the facilities furnished for the public desiring the transportation which the carrier is furnishing, there is an explicit proviso in the Act to the effect that a railroad need not give the use of its terminals to its rivals. Thus a freight depot owned and maintained by a carrier is a terminal facility for use in handling business from its own line, and cannot under section 3 be used for handling business from other lines without its consent.¹² On the other hand, railroads may voluntarily open their terminals to other carriers, as apparently all railroads at Detroit voluntarily open their trackage to other railroads entering that city.¹³ Very often, as at St. Louis, the so-called terminal is in reality a connecting carrier; and the law governing such terminal lines is that imposing the obligation of interchange of traffic, rather than the utilization of facilities.¹⁴ A company which offers a terminal service as such to all comers would seem to be in a position where it could be compelled to treat all with equality; and in this view of the matter it all depends upon the basis upon which the terminal is constituted. The Peoria case, recently decided, contains the most important rulings of the Commission on these problems. The Commission in effect found that the defendant was a terminal company constructed for the purpose of giving main-line roads access to various industries in and about Peoria, and virtually organized to furnish terminal facilities for car-

¹¹ Unless a terminal is operated upon a public basis its owners cannot be compelled to admit other railroads; see *Terre Haute & I. R. R. v. Peoria & P. V. Ry. Co.*, 167 Ill. 296, 47 N. E. 513; and *Com. v. Norfolk & W. Ry.*, 103 Va. 291, 68 S. E. 351.

¹² *R. R. Com. of Arkansas v. St. L., I. M. & S. Ry.*, 24 I. C. C. 292.

¹³ *Detroit Switching Charges*, 28 I. C. C. 494.

¹⁴ *Mfgs. Ry. Co. v. St. L., I. M. & S. Ry.*, 28 I. C. C. 93.

riers which lacked them;¹⁵ and it held, therefore, that the very business of such terminals is to furnish facilities for railroads entering the city, and that section 3 obviously could have application only to railroads as such. To be contrasted with this is the Pittsburgh case later, where the refusal of the Pennsylvania railroad to open its terminals interchangeably with other systems entering the city, while arrangements to that end with its own family lines were made, was held not to constitute undue discrimination.¹⁶ For it would seem clear that to claim that a railroad is required to handle the cars of another over its terminal trackage for a switching charge, however fair the allowance might be, would undoubtedly be to give the use of those terminals to its competitor, unless the through rate is divided. Since the Amendments to section 1 of 1906 the proviso in section 3 of the Act has been necessarily modified, and it is now well settled, with the Commission at least,¹⁷ that a carrier cannot close any of its trackage or its terminals to the uses of the public in through commerce, where fair compensation in one way or another is allowed, and restrict service thereon to shippers or receivers upon its own lines.

§ 177. Switching.

Fundamentally, as the courts hold, a railroad is under no obligation to deliver beyond its own trackage; at least it is not bound to make delivery at its own cost beyond its own lines.¹⁸ But, if a railroad goes so far in its schedules as to undertake delivery within switching limits defined therein, such track delivery becomes part of the transportation service undertaken under the through rate.¹⁹ Consequently, as the Commission has decided, in

¹⁵ *St. Louis, S. & P. R. R. v. P. & P. U. Ry.*, 26 I. C. C. 226.

¹⁶ *Waverly Oil Works v. P. R. R. Co.*, 28 I. C. C. 621.

¹⁷ *Iowa & G. M. Ry. v. C., B. & Q. Ry.*, 32 I. C. C. 172.

¹⁸ *Banner Grain Co. v. Gt. Northern Ry.*, 119 Minn. 68, 137 N. W. 161.

¹⁹ *Interstate Commerce Commission v. Atchison, T. & S. F. Ry.*, 234 U. S. 294, 34 Sup. Ct. 814.

the absence of tariff provision to the contrary, rates to a given point include delivery only on a carrier's own rails.²⁰ But where a wider delivery is scheduled, the switching between the tracks of a carrier and the loading and unloading points of an industry becomes part of interstate transportation.²¹ Granting free transfer service to private sidings of some consignees and refusing it to complainants is, therefore, held to be unjust discrimination under the Act.²² And in the case of a reciprocal switching arrangement, which excluded shipments of ice from its operation, it was held that this constituted an unjust discrimination against that traffic.²³ Undue disadvantage also results, as will be seen later, from failure to accord a terminal switching allowance to complainant, while granting it to competing industries performing similar services.²⁴ But refusal to switch to its own team track a car received from a connecting line is held not unlawful, notwithstanding the fact that through mistake defendant had on several occasions performed such service for others.²⁵ Of course, a railroad may not reasonably be required to accept and deliver free of charge traffic moved by its competitor.²⁶ And it may charge for foreign line switching, when it makes no charge for similar delivery when it gets the line haul.²⁷ What amounts to a belt line haul justifies an additional transportation charge.²⁸ And a delivering road performing only switching service is entitled to due compensation therefor.²⁹ But it would be plain discrimination in service to deliver under the rate on switching cars only

²⁰ *Ohio Iron & Metal Co. v. C., M. & St. P. Ry.*, 28 I. C. C. 703.

²¹ *Alan, Wood Iron & Steel Co. v. P. R. R.*, 24 I. C. C. 27.

²² *Pierce Co. v. N. Y. C. & H. R. R. R.*, 19 I. C. C. R. 579.

²³ *In re Advances on Ice*, 24 I. C. C. 660.

²⁴ *Buffalo Union Furnace Co. v. L. S. & M. S. Ry.*, 21 I. C. C. R. 620.

²⁵ *Railroad Commission of Ark. v. St. L., I. M. & S. Ry.*, 24 I. C. C. 292.

²⁶ *Laning-Harris Coal & Grain Co. v. A., T. & S. F. R. Co.*, 12 I. C. C. 479.

²⁷ *Pacific Coast Jobbers & Mfgs. Assn. v. S. P.*, 18 I. C. C. 33.

²⁸ *Pierce v. Pittsburgh & L. E. Ry.*, 23 I. C. C. 89.

²⁹ *Curtis Bros. Co. v. So. Pac. R. R.*, 23 I. C. C. 372.

for one concern and not for another across the street.³⁰ It is held by the Commission to be discriminatory to perform switching under an arrangement with one road at a certain point, while refusing to enter into similar arrangements with another.³¹ And a carrier may not cancel switching arrangements with one carrier, while maintaining former arrangements with another.³²

§ 178. Lighterage.

Problems as to lighterage cannot be solved in any case until the basis upon which it is being rendered is examined. Railroads terminating in a port may establish a zone of delivery by water, within which they will deliver such freight consigned within the limits set, using lighters owned by them or operated under their auspices.³³ On the other hand, lighterage may be performed to and from water terminals by independent companies, operating as common carriers subject to the Act, and, as such, entitled to through routes and joint rates with a rail line, so long as such rail line makes similar joint arrangements with complainant's competitors.³⁴ If, by the schedules of the railroad, delivery within the port by water is undertaken, the carrier may either lighter the goods itself at its own cost, or allow each shipper to do it in his own way, making an allowance to the shipper for performing the service. The 15th section of the Act as amended clearly implies that a just and reasonable allowance may be made to the owner of property transported, when such owner renders a service connected with or furnishes an instrumentality used in the transportation.³⁵ The Sugar Lighterage Case recently decided by the Supreme Court, after a long course of litigation beginning in proceedings before the Commission,

³⁰ *United States Button Co. v. C., R. I. & P. Ry.*, 32 I. C. C. 149.

³¹ *Buffalo, R. & Pitts. R. R. v. Pa. Ry.*, 29 I. C. C. 114.

³² *Switching at Galesburg, Ill.*, 31 I. C. C. 294.

³³ *Chicago Lighterage Charges*, 30 I. C. C. 390.

³⁴ *Murray Lighterage & Tr.-Co. v. D. & H. Co.*, 25 I. C. C. 388.

³⁵ *Federal Sugar Refining Co. v. B. & O. R. R. Co.*, 17 I. C. C. 40.

is the last word on this subject.³⁶ It was there held that the interstate trunk railway companies whose freight rail terminals are at the New Jersey shore of New York harbor, having established a zone covering substantially the commercial and manufacturing river front of Greater New York, within which, as a part of the transportation, they perform lighterage service without additional charge to and from any public or private dock, may pay a reasonable compensation upon the tonnage basis to the owners of a water front within such zone, who are operating a sugar refinery near by, for the maintenance by them of a public freight terminal station there, and for lightering all freight between that station and the rail terminals, without allowing similar compensation to sugar refiners whose plant is situated some ten miles beyond the limits of the free lighterage zone for lightering their sugar from refinery to such terminals.

§ 179. Drayage.

Railroads, however, commonly do not undertake delivery beyond points reached by their own rails; and, generally speaking, transfer service beyond a station is no part of the transportation service they offer.³⁷ But a railroad may undertake delivery by wagon to the consignee at his address; and there are instances of store door delivery in particular localities, although such a service, even if once generally furnished, may later be altogether discontinued.³⁸ It would necessarily be illegal discrimination between shippers in the same community to make an allowance for cartage to one, and not to all others.³⁹ But it would not inevitably be undue preference to include drayage in the service to one locality, while not performing it in another.⁴⁰ While such delivery service is offered

³⁶ *United States v. Baltimore & O. R. R.*, 231 U. S. 274, 56 L. ed. 1107, 34 Sup. Ct. 75.

³⁷ *Southwestern Produce Distributors v. W. R. R.*, 20 I. C. C. R. 458.

³⁸ *Washington Store Door Delivery*, 27 I. C. C. 347.

³⁹ *Wright v. U. S.*, 167 U. S. 512, 42 L. ed. 258, 17 Sup. Ct. 822.

⁴⁰ *Interstate Com. Comm. v. De-*

there must be no discrimination within the territory thus served; merchants in one part of Washington, D. C., have been held to be subjected to undue prejudice by being compelled to pay a drayage charge while merchants located in Georgetown, D. C., are given free pick-up and delivery service.⁴¹ But a carrier was not required to resume delivery of melons at piers in New York, conditions justifying change of delivery from New York City to Jersey City.⁴² Free drayage service may be necessitated by comparative disadvantage of location of station with competitor to the industrial section of city.⁴³ But discrimination cannot be justified against one locality merely because it is smaller than another locality.⁴⁴ A drayman may be a common carrier and treated as such in his relation with the railroads;⁴⁵ but, short of this actual participation in a through route being shown, the Commission has no jurisdiction over a common-carrier transfer company.⁴⁶ And a railroad itself undertaking delivery by wagon may enter into exclusive arrangements with one concern to perform the trucking for it.⁴⁷

§ 180. Loading.

The present idea as to carload rates is that the consignees will unload the cars, and that freight shipped under such rates will not be required to pass through the carrier's freight houses.^{47a} Loading by the consignor is a long-recognized rule of carload transportation.^{47b} It follows that loading and unloading carload freight is an extra

troit, G. H. & M. Ry., 167 U. S. 633, 42 L. ed. 406, 17 Sup. Ct. 986.

⁴¹ Merchants & M. Assn. v. Baltimore & O. R. R., 30 I. C. C. 388.

⁴² Casassa v. P. R. R., 24 I. C. C. 629.

⁴³ Bahrenburg Bros. & Co. v. A. C. L. R. R. Co., 24 I. C. C. 561.

⁴⁴ Kansas City & M. Ry. Rate Cancellation, 28 I. C. C. 640.

⁴⁵ Harbor City Wholesale Co. of

San Pedro v. S. P. Co., 19 I. C. C. 323.

⁴⁶ Anacostia Citizens Asso. v. B. & O. R. R., 25 I. C. C. 411.

⁴⁷ S. Louis Drayage Co. v. Louisville & N. R. R., 65 Fed. 39.

^{47a} In re Advances in Demurrage Charges, 25 I. C. C. 314.

^{47b} National Wholesale Lumber Co. v. A. X. C. L. R. R. Co., 14 I. C. C. 154.

service by the carriers.^{47c} The carrier, therefore, is entitled to extra compensation for such loading or unloading.^{47d} Free unloading service granted to some shippers, and refused to others, would be improper.^{47e} For the loading and unloading of carload freight is devolved otherwise upon the shipper and consignee.^{47f} It cannot, however, be stated as a matter of law that it is the absolute duty of carriers to unload carloads of package freight, nor that this duty rests upon the shipper, as it is rather a question with respect to each commodity of what, under the circumstances, is just and reasonable, and perhaps also what has been the practice.^{47g} To make allowances based upon the performance by shippers of services which shippers are legally bound to render for themselves, is a violation of the Act.⁴⁸ Trimming or leveling coal in the holds of ships is a necessary service in connection with the transportation of coal by water, and where performed by the rail carriers it must be regarded as a part of the delivery.⁴⁹ But custom and conditions justify compelling shipper to stake open lumber cars.⁵⁰

§ 181. Refrigeration.

When ice is actually needed, and used in transportation of fruit, it depends upon the circumstances of each case whether the icing is a part of preparation which can be done by the shipper, or part of refrigeration which the carrier has the exclusive right to furnish. Where a refrigeration service is entirely and wholly under the control of a carrier, which determines when ice shall be

^{47c} *Schultz-Hansen Co. v. So. Pac. Co.*, 18 I. C. C. 234.

^{47d} *Davies v. Louisville & N. R. R.*, 18 I. C. C. 540.

^{47e} *Davies v. I. C. R. R. Co.*, 19 I. C. C. R. 3.

^{47f} *Coke Producers' Asso. of Connellsville v. B. & O. R. R. Co.*, 27 I. C. C. 125.

^{47g} *Wholesale Fruit & Produce*

Ass'n v. A., T. & S. F. Ry., 14 I. C. C. 410.

⁴⁸ *In the Matter of Allowances for the Transfer of Sugar*, 14 I. C. C. 619.

⁴⁹ *New England Coal & Coke Co. v. N. & W. Ry.*, 22 I. C. C. 398.

⁵⁰ *National Wholesale Lumber Dealers Assn. v. Atlantic C. L. R. R.*, 14 I. C. C. 154.

supplied and in what quantities, the amount depending upon the manner in which the carrier itself handles the car, the refrigeration charge should be a gross sum, and shippers should not be required to pay for the ice consumed in reicing.⁵¹ Loading the car, by whomsoever done, must be such as to prepare the freight for shipment, and a consignor may, in the absence of a regularly filed tariff covering this work, not only load perishable freight, such as fruit in a car placed at his warehouse, but may do all other acts, including precooling necessary to fit the fruit for shipment and filling bunkers in the car with ice for its preservation.⁵² It should be noted that there are private lines of refrigeration cars offering their services to the shipping public which are now subject to the jurisdiction of the Commission.⁵³ There is no apparent distinction between the duty to furnish heating and duty to furnish refrigeration; and in a recent case the use of privately owned heater cars, and the charges which may properly be made to shippers for use of such cars are fully discussed.⁵⁴

§ 182. Elevation.

Under the Act as amended in 1906, elevation is specifically made such a part of transportation as to bring it within the jurisdiction of the Commission, which is authorized to determine what is a reasonable allowance to the shipper for elevation services.⁵⁵ And the courts have held that the Commission has no power to forbid carriers from paying or allowing for the elevation and transfer of grain in transit reasonable compensation, because there

⁵¹ *Crutchfield & W. v. S. P. Co.*, 24 I. C. C. 651; see also *Railroad Commission of Calif. v. Ala. G. & S. Ry.*, 32 I. C. C. 17.

⁵² *Atchison, T. & S. F. Ry. Co. v. U. S.*, 232 U. S. 199, 34 Sup. Ct. 291. See also *Refrigerating Charges of Kansas City So. Ry.*, 26 I. C. C. 617.

⁵³ *Waco Freight Bureau v. H. & T.*

C. R. R., 19 I. C. C. 22; see also *Re Transportation of Fruit*, 10 I. C. C. 360.

⁵⁴ *In re Advances on Potatoes*, 25 I. C. C. 159; see also *Re Rentals for Insulated Cars*, 31 I. C. C. 255.

⁵⁵ *Union Pacific R. R. v. Updike Grain Co.*, 222 U. S. 215, 56 L. ed. 171, 32 Sup. Ct. 39.

is a possibility of a future violation of the law arising out of such allowances.⁵⁶ Considering the elevator allowance cases of Supreme Court together, the Commission has concluded that it was the intention of the Supreme Court to hold that, whatever might be the case if railroad saw fit to confine its payment to elevation actually required in transportation of grain, it must, when it makes this allowance to one elevator, under such circumstances as to give that elevator payment for commercial elevation, extend the same privilege to all other elevators similarly situated.⁵⁷ A carrier subject to the Act to Regulate Commerce may either construct and operate the elevator itself, or furnish elevation by arrangement with the owner of an elevator; and the amount of compensation paid by the carrier to such owner is of no concern to shippers or to other carriers, unless it operates to affect the rates on grain, or by some device a portion of the allowance is returned to shippers, and thus becomes a rebate.⁵⁸

§ 183. Storage.

Storage of commodities outside of cars for convenience of shippers while markets are being sought is not properly carrier's function.⁵⁹ It is the duty of a consignee to receive his freight within a reasonable time after its arrival at destination; where he neglects to do so, the liability of the railroad as a common carrier ceases and it becomes a warehouseman. But the railroad is under no legal liability to continue to discharge the duty of warehouseman, and may insist that the freight shall be removed by the consignee.⁶⁰ There is no legal right in a consignee of freight to use a car as a warehouse; and no right to use a car or track as a trading place to the embarrassment of

⁵⁶ *Peavey & Co. v. U. P. R. R. Co.*, 222 U. S. 42, 56 L. ed. 83, 32 Sup. Ct. 1.

⁵⁷ *Traffic Bureau of St. Louis v. C., B. & Q. R. R.*, 22 I. C. C. R. 496.

⁵⁸ *In re Allowances to Elevators by U. P. R. R.*, 12 I. C. C. 85.

⁵⁹ *Reconsignment and Storage of Lumber and Shingles*, 27 I. C. C. 451.

⁶⁰ *In re Advances in Demurrage Charges*, 25 I. C. C. 314.

the carrier.⁶¹ As it is not the duty of the carrier to furnish storage beyond a reasonable time necessary to unload, the Commission has no authority by the Act, where a carrier has not held itself out as granting storage, to order it furnished; but, if it is furnished and charged for, storage becomes an incident in connection with transportation, and the legality of the rule becomes a proper matter for consideration by the Commission.⁶² While carload quantities should not be received in the carrier's freight houses, nevertheless, when a carrier has actually stored and handled carload quantities, it is entitled to fair compensation for the additional service.⁶³ Storage of grain beyond such a reasonable time as is required for its transfer ceases to have any character as transit elevation subject to the Act; it becomes commercial elevation with which the Commission has held that it is not necessarily concerned.⁶⁴

§ 184. Transit privileges.

A transit privilege is one whereby certain things may be done to goods in transit at an intermediate point without losing the right to have the through rate apply.⁶⁵ And the charge, therefore, usually in the form of a fixed sum to be added to the through rate whatever it may be, is a regulation affecting the rate of which the Commission has jurisdiction.⁶⁶ The Act as amended gives to the Commission adequate power to regulate transit privileges, and it may upon full hearing prescribe such rules therefor as will in its opinion free the operation of transit privileges from illegal practices.⁶⁷ Transportation itself includes such services as elevation and refrigeration, storage and delivery.⁶⁸ But such transit services as milling and recon-

⁶¹ *Wilson Produce Co. v. Penn. R. R.*, 16 I. C. C. 11.

⁶² *Peale, Peacock & Kerr v. C. R. R. Co. of N. J.*, 18 I. C. C. 25.

⁶³ *Western Classification Case*, 25 I. C. C. 442.

⁶⁴ *Matter of Elevation Allowances*, 14 I. C. C. 315.

⁶⁵ *National Wool Growers' Case*, 23 I. C. C. 151.

⁶⁶ *Speigal v. S. Ry.*, 25 I. C. C. 71.

⁶⁷ *Transit Case*, 24 I. C. C. 340.

⁶⁸ *Re Elevation Allowances*, 24 I. C. C. 197.

signment, bagging and compressing, are services for which under the Act the carrier may not improperly be expected to arrange.⁶⁹ And, generally speaking, the charges for fabrication in transit of any sort, if rendered, may properly be made sufficiently high to give a profit to the company.⁷⁰

§ 185. Transportation services.

What is included under the head of transportation is often difficult to determine; but only for such service can special allowances be made to favored shippers.⁷¹ The Commission is virtually directed to limit the amount that the carrier may pay to a shipper for transportation services rendered by the latter.⁷² And, moreover, additional charges should be made for any independent service rendered to any particular shipper.⁷³ It is an established principle that the carrier is entitled to repayment of the cost of the service, together with a reasonable profit on that cost, when performing auxiliary functions.⁷⁴ Certain matters are plainly altogether outside of what is involved in transportation. Station restaurants, news stands, barber shops, and similar private enterprises at railroad terminals are no part of transportation service.⁷⁵ Services rendered by the defendant in providing a place where consignments of perishable produce can be handled, and in assorting into lots the packages marked with the names of the single dealers to whom they are consigned, is a thing of value to the shipper for which he may properly be required to pay.⁷⁶ The merchandising of grain is not part of the duty of a carrier, and for carriers to pay shippers for any of the operations of such merchandising is to make

⁶⁹ *Becker v. B. & M. Ry.*, 28 I. C. C. 645.

⁷⁰ *Fabrication in Transit Charges*, 29 I. C. C. 70.

⁷¹ *Inman, Akers & G. v. A. C. L. Ry.*, 32 I. C. C. 146.

⁷² *Sterling & Son Co. v. M. C. R. R.*, 21 I. C. C. R. 451.

⁷³ *Pittsburgh Steel Co. v. L. S. & M. S. Ry.*, 27 I. C. C. 173.

⁷⁴ *Detroit Traffic Asso. v. L. S. & M. S. Ry.*, 21 I. C. C. R. 257.

⁷⁵ *Southwestern Produce Distributors v. W. R. R.*, 20 I. C. C. R. 458.

⁷⁶ *Davies v. I. C. R. R.*, 17 I. C. C. 186.

reduction from published rates by subterfuge.⁷⁷ The Commission, however, has no jurisdiction over alleged unreasonable charges of a transfer company, where the railroad carrier does not undertake to make delivery of passenger baggage at residences for rate of fare stated in its tariffs.⁷⁸

Topic C. Public Profession

§ 186. Who are common carriers.

In the earlier cases of public employment the profession to serve all that appear was spoken of as the assumption of a public trust in undertaking the business or as granting to the public of an interest in that business. The original rule was clearly expressed over two centuries ago by Lord Holt that, wherever any subject takes upon himself a public trust for the benefit of the rest of his fellow-subjects, he is *eo ipso* bound to serve the subject in all the things that are within the reach and comprehension of such an office, under pain of an action against him. Common carriage, as the cases have always pointed out, involves a certain kind of service performed under certain conditions. In order to determine whether a person is a common carrier, it must be determined first, whether his business is that of carrying, second, whether it is a public one. One who is transporting goods from place to place for hire as his principal occupation for all that see fit to employ him is a common carrier. A common or public carrier, whether of goods or of passengers, is one who is engaged in carrying as a public employment. "One who by virtue of his calling undertakes for compensation to transport personal property from one place to another for all such as may choose to employ him"—is one succinct definition.⁷⁹ "A person who undertakes to transport from place to place for hire the goods of those who choose to employ

⁷⁷ *Gund & Co. v. C., B. & Q. R. R.*,
18 I. C. C. 364.

⁷⁸ *Cosby v. Richmond Transfer
Co.*, 23 I. C. C. R. 72.

⁷⁹ *Jackson Architectural Iron
Works v. Hurlbut*, 158 N. Y. 34,
38, 52 N. E. 665, 70 Am. St. Rep.
432.

him"—is another.⁸⁰ It is, therefore, recognized everywhere, in the commissions as well as in the courts, that the test is whether service is rendered particular customers or whether there is service offered to every shipper who comes along.

§ 187. Commitment to public service.

When there has been general solicitation of the public, there can be little doubt of the public profession. Something, therefore, must be found to show that in the service in question there has been a commitment to the public service.⁸¹ But so long as a road holds itself out as a common carrier, and trunk lines make joint rates with it, innocent third parties have a right to assume that the road is what it purports to be.⁸² Incorporation is not a condition precedent to right to be a common carrier by rail, so far as interstate transportation is concerned.⁸³ By the terms of the Act it makes no difference by whom the service is conducted; therefore holding under a trackage agreement will be considered to be tantamount to ownership of a line over which the trackage privilege exists.⁸⁴ If a lessor company is chartered as a carrier, it appears to be subject to the Act, though the transportation is actually furnished by another.⁸⁵ Where a city has constructed a railroad in order to reach a certain market, and leases the same to another railroad, questions of reasonableness of rates stand exactly as if the road had been built by private capital.⁸⁶ A lessor may, therefore, be in such a position that the law will hold it ultimately responsible for the rendering of the service, as was pointed out in a recent case in the Supreme Court.⁸⁷ And, as was

⁸⁰ *Elkins v. Boston & M. R. R.*, 23 N. H. 275.

⁸¹ *Mfrs. Ry. Co. v. St. L., I. M. & S. Ry.*, 21 I. C. C. R. 304.

⁸² *St. Louis, S. & P. R. R. v. P. & P. U. Ry.*, 26 I. C. C. 226.

⁸³ *Crescent Coal & Mining Co. v. C. & E. I. R. R.*, 24 I. C. C. 140.

⁸⁴ *Tap Line Case*, 23 I. C. C. 277.

⁸⁵ *Heck v. East Tenn. & O. G. Ry.*, 1 Int. Com. Rep. 775, 1 I. C. C. 495.

⁸⁶ *Receivers' and Shippers' Ass'n of Cincinnati v. C., N. O. & T. P. Ry.*, 18 I. C. C. 440.

⁸⁷ *No. Carolina R. R. Co. v. Lackery*, 232 U. S. 248, 34 Sup. Ct. 308.

said in another case at about the same time, any attempt to cloak the actual control of the interstate transportation by having a holding company will fail of its purpose.⁸⁸

§ 188. Nature of public profession.

The plainest justification for the imposition of the extraordinary law which requires those who are in public callings to serve all that apply at reasonable rates, is that in initiation the service is voluntary. People are not forced into public service against their wills; it is only when they have held themselves out in some way as ready to accommodate all that apply that they are bound to serve indiscriminately. Such a case is that of the lighterman, as was decided in the leading case of *Ingate v. Christie*,⁸⁹ where Baron Alderson delivered the following opinion: "Everybody who undertakes to carry for any one who asks him, is a common carrier. The criterion is, whether he carries for particular persons only, or whether he carries for every one. If a man holds himself out to do it for every one who asks him, he is a common carrier; but if he does not do it for every one, but carries for you and me only, that is matter of special contract. Here we have a person with a counting-house, 'lighterman' painted at his door, and he offers to carry for every one." On the other hand, where the employment is casual only, and not a regular matter of business, the carrier is not a *common* carrier. As was said in the leading case of *Allen v. Lackneles*⁹⁰ by Mr. Justice Parker: "The only question in the case is, were the defendants common carriers? The facts

⁸⁸ *United States v. Union S. Y. & T. Co.*, 226 U. S. 286, 33 Sup. Ct. 83.

⁸⁹ 3 Car. & K. 61.

The Commission rejects the theory that a railroad is a common carrier only for those who have been accustomed to patronize it, and that it can favor its old customer at the expense of its new ones. In *re Mine Ratings*, 25 I. C. C. 286.

⁹⁰ 37 N. Y. 341.

But the Commission will not recognize as common carriers any lines that do not publish tariffs in lawful form, or concur properly in lawful tariffs of other lines, or that do not in all other respects comply with the law. *Star Grain & L. Co. v. A., T. & S. F. Ry.*, 17 I. C. C. 333.

found by the referee do not, I think, make the defendants common carriers. They owned a sloop; but it does not appear that it was ever offered to the public or to individuals for use, or ever put to any use, except in the two trips which it made for the plaintiffs, at their special request. Nor does it appear that the defendants were engaged in the business of carrying goods, or that they held themselves out to the world as carriers, or had ever offered their services as such. This casual use of their sloop in transporting plaintiffs' property fails short of proof sufficient to show them common carriers."

§ 189. Extent of the power of regulation.

What would seem to be a constitutional limitation upon the regulating power should be noted. Regulation of this peculiar sort, going to the extent of compulsory service, should be confined to what may properly be considered public callings. Unless the business in question is one which is public in character it is not one which it would be due process of law to regulate to the extent of fixing its rates. And unless in the particular instance the business is being conducted upon a public basis, regulation to that extent of what is still a private affair would be equally improper. Thus although the Supreme Court has held in a principal case that the rates at grain elevators might be regulated,⁹¹ it has pointed out in a later case that this would not be applicable to a man who was simply storing his own grain in his own elevator.⁹² The business must be one in which the public has an interest, and at the same time one in which the proprietor has committed himself to serve the public. Those who conduct wharves as landings for the public must serve all at reasonable rates;⁹³ but at his private wharf one may discriminate as he pleases in

⁹¹ *Muan v. Illinois*, 94 U. S. 213, 24 L. ed. 77.

⁹² *Brass ex rel. v. Stoecker*, 153 U. S. 391, 38 L. ed. 757, 12 Sup. Ct. 468.

⁹³ *Transportation Co. v. Parkersburg*, 107 U. S. 691, 27 L. ed. 584, 2 Sup. Ct. 732.

the conduct of his business.⁹⁴ For the legislature to make a general rule applicable to all concerns in certain businesses, or for a commission acting by its authority, to order that the public should be served by any particular company, unless both requisites are present, would seem to deprive the owners and proprietors of their liberty and property. When the proprietors have never taken anything but their own oil through these lines, or at all events never made any profession of taking oil for others, can they be said to have committed themselves to public service? The Supreme Court in the Pipe Line Cases⁹⁵ recognizes this as a general principle, perhaps, but points out that in the particular cases before them there were found such special circumstances of interdependent purchase and transportation as to justify the action taken by the Commission under the discretion of the Congress to prevent restriction of commerce by the monopoly created. Not long before in a case not altogether dissimilar, as it involved the effect of interrelations, the same court⁹⁶ had held that where a railroad system engaged in interstate commerce controls through stock ownership a wharf company which has been chartered for the purpose of furnishing terminal facilities, the conduct of such a terminal being public in character, is subject to the jurisdiction of the Interstate Commerce Commission.

§ 190. Public railroads.

A public railroad is one which holds itself out as ready to engage in transportation for hire as a public employment; and generally the rights of the liability of a common carrier do not attach to one who does not so hold itself out.⁹⁷ But if a railroad offers its services to all the public who are in a position to avail themselves thereof, the

⁹⁴ *Weems Stb. Co. v. People's Stb. Co.*, 214 U. S. 345, 53 L. ed. 1024, 20 Sup. Ct. 661.

⁹⁵ *United States v. Ohio Oil Co.*, 234 U. S. 548, 34 Sup. Ct. 946.

⁹⁶ *Southern Pac. Terminal Co. v. Int. Com. Comm.*, 219 U. S. 498, 31 Sup. Ct. 279.

⁹⁷ *Kansas City v. K. C. V. & T. Ry.*, 24 I. C. C. 22.

fact that the class actually using it was limited does not render it any the less a common carrier.⁸⁸ When a public railroad builds a branch line from its road, primarily to accommodate some individual business, it is nevertheless a common carrier over the branch, and the use of the track is open to all who have occasion to use it as well as to the particular individual for whose benefit it was built. The taking of land for a spur track to connect with a single industry is a taking for public use, if the purpose of the company is to maintain and operate such track as an integral part of its railway system, so as to serve all who may desire it, and all can demand, as a right, to be served without discrimination.⁸⁹ The distinction between the public branch and the private spur appears to lie merely in the facts as to the use which can be made of the road. If it runs for a considerable distance, so that at a future time demands not now in existence may come into being and the road may be of use to a number of persons, it is a public road. If, however, the premises of the individual benefited either directly adjoin the railroad or are separated only by a few feet, so that the intervening land can be accommodated from the main track, then the use is a private one; and that was the fact in the cases previously examined of private spurs.^{90a}

§ 191. Private railroads.

It will follow from what has been said that a railroad, constructed and used merely in connection with the conduct of a private business, is not a common carrier. A railroad built to haul logs out of the forest, nothing more than a logging railroad appurtenant to a sawmill, constructed wholly on private grounds, and operated for private purposes, is not a common carrier, charged with all the duties and responsibilities incumbent by the laws

⁸⁸ *Mfgs. Ry. Co. v. St. L., I. M. & S. Ry.*, 28 I. C. C. 93. L. R. A. 240, 88 Am. St. Rep. 918.

⁸⁹ *Sholl v. German Coal Co.*, 118

⁹⁰ *Chicago & N. W. Ry. v. Morehouse*, 112 Wis. 1, 87 N. W. 849, 56 Ill. 427, 10 N. E. 199, 59 Am. Rep. 329.

of the land upon common carriers.¹ Even such a railway may be a public one, as a Minnesota case holds: "If all the people have the right to use the road it is a public use or interest although the number who have business requiring its use may be small."² It has been held in Louisiana that "a railway, whose sole object was to foster the private ends of two certain persons named, who owned jointly two sugar plantations, and who wished to transport the sugar cane grown on one of the plantations to the refinery situated on the other, was not, *ex necessitate*, such a corporation for public improvement as would authorize the expropriation of private property for its purposes."³ And a railroad used in transporting property within a private stock-yard is not a common carrier.⁴

§ 192. Industrial railways.

An added importance has accrued to this subject because of the comparatively recent invention of a kind of railway known as the "industrial" railway. This is a short line of railway, owned by an industrial corporation or by the owners of some business enterprise, and connecting the factory or the place of business with the main line of some railway.⁵ It may amount to no more than a short spur track; but it is organized as an independent railway corporation, and the owners of the industrial enterprise are its stockholders. If such a road, however short it may be, is actually operated independently with its own locomotives and cars, it would seem to be an independent carrier, though it is operated for the exclusive

¹ Wade v. Lutch & Moore Lumber Co., 74 Fed. 517, 20 C. C. A. 515, 33 L. R. A. 255.

² Kettle River R. R. Co. v. Eastern Ry., 41 Minn. 461, 43 N. W. 469, 6 L. R. A. 111.

³ Williams v. Judge of Eighteenth Judicial Dist. Ct., 45 La. Ann. 1295, 14 So. 57.

⁴ Swift v. Ronan, 103 Ill. App. 475.

⁵ Tap Line Cases, 23 Int. Com. Rep. 277.

The term "common carrier" used in the Act means those carriers which are common carriers at common law, and which have complied with such requirements as may be imposed by constitutional or legislative authority. *Mfrs. Ry. Co. v. St. L., I. M. & S. Ry.*, 21 I. C. C. 304.

benefit of the industrial enterprise which owns it; and this is certainly the case where it accepts such general traffic along its line as may be offered to it. Of the possibilities of the recognition of such railway as carriers subject to the Act, the Commission⁶ quite early said, by Mr. Commissioner Prouty: "The Illinois Northern Railroad is a common carrier within the first section of the act to regulate commerce. It is incorporated as a railroad company under the laws of Illinois. It actually owns and operates a line of railroad. It maintains a freight station, at which it receives and delivers for the general public considerable quantities of less than carload freight. Its main business is the moving of loaded cars to and from various industries along its line, and in this capacity it serves more than two hundred plants, besides that of the International Harvester Company. Manifestly there is no reason in law why this railroad may not make joint rates, file joint tariffs and agree upon joint divisions as other railroads do. We are not called upon to decide what the situation might be if this road were a private carrier maintaining switch tracks and switching cars to and from the McCormick works exclusively. The mere fact that this road is to-day entirely owned by the largest individual shipper over it, or that it was originally organized and built for the purpose of doing the work of that shipper, is not, in our opinion, controlling against the legality of the transaction before us."

§ 193. Joint rates.

If such an industrial railway be a common carrier, a through rate may be fixed, originating at the point of loading the timber, together with a milling-in-transit privilege.⁷

⁶ Re Divisions of Joint Rates, 10 I. C. C. Rep. 385.

An industrial line, held to be a common carrier, is thereafter a public agency which should collect its charge from former owning industry

the same as from other shippers. 28 I. C. C. 93.

⁷ Central Yellow Pine Asso. v. Vicksburg, etc., Ry., 10 Int. Com. Co. Rep. 193.

But it is always insisted in this regard that with respect to through transportation, at joint rates, the Act applies only to common carriers.⁸ If, therefore, an industrial railway may properly be held to be a common carrier, it is entitled to enter into through routes on interstate traffic.⁹ And, if it be determined that the railway is a true common carrier, it is as such entitled to a division of the through rate, the fact that the road is owned by the largest individual shipper over it being of no consequence in this connection.¹⁰ Industrial lines controlled financially by same persons who control the industries which furnish the bulk of their tonnage have repeatedly been held to be common carriers, and entitled to divisions.¹¹ And this is true, although the trackage was originally built for the purpose of doing the work of a particular shipper.¹² The Commission is not concerned with fact that one shipper also owns the mill in which such shingles were produced, while another shipper has purchased the same from the producer.¹³ It should be emphasized that the Commission has jurisdiction to fix the maximum divisions to be allowed to industrial railways.¹⁴ But it should be noted that transportation allowances under section 15 can only be made to "the owner of property transported."¹⁵ The Commission will scrutinize the situation to see if favors to a tap line are being given, where there is doubt as to being a common carrier, and whether continuance of divisions with it may not be working a discrimination against other shippers.¹⁶ But whether a carrier may grant an allowance to a terminal road that is a common carrier,

⁸ *Mfgs. Ry. Co. v. St. L., I. M. & S. Ry.*, 21 I. C. C. 304.

⁹ *St. Louis, S. & P. R. R. v. P. & P. V. Ry.*, 226.

¹⁰ *Star Grain, etc., Co. v. Atchison, etc., Ry.*, 17 I. C. C. 338.

¹¹ *McCloud R. L. Co. v. S. P. Co.*, 24 I. C. C. 89.

¹² *Crane R. R. Co. v. P. & R. Ry.*, 15 I. C. C. 248.

¹³ *Reconsignment and Storage of Lumber and Shingles*, 27 I. C. C. 451.

¹⁴ *L. & N. R. R. Co. v. M., St. P. & S. S. M. Ry.*, 24 I. C. C. 639.

¹⁵ *B. & G. N. R. R. v. A., T. & S. F. Ry.*, 24 I. C. C. 161.

¹⁶ *C. V. & N. Ry. Co. v. M., St. P. & S. S. M. Ry.*, 24 I. C. C., 634.

while denying such allowance to a terminal road not a common carrier, is not altogether clear.¹⁷ It is, however, well established that common-carrier industrial roads are entitled to be parties to through routes.¹⁸ Moreover, the Commission, in the exercise of the power it now possesses, will inquire whether the line in question has held itself out as being a carrier for the public.¹⁹ If former joint arrangements between trunk lines and industrial lines are cancelled, the Commission may require them to be restored.²⁰ The withdrawal of a joint rate which resulted in advance may be held not to be justified, and the former rate may be restored.²¹

§ 194. Tap lines.

If the "industrial railway" is simply a "tap line," not a common carrier operating a service over its rails for all that apply, it cannot pose as an independent carrier and demand the right to enter into prorating arrangements with succeeding carriers. It was pointed out in the recent Tap Line cases²² that whether a company or person claiming to be a common carrier is a common carrier at all and for all purposes, is a question of fact, and whether the service performed for a particular person is a service of transportation or an industrial service, is also a question of fact; and that where the holding out as a common carrier is in furtherance of a plan to secure unlawful advantages, and the alleged carrier is able to pick up some traffic that is incidental to that purpose, it must

¹⁷ *Soft Coal Rates from Southern Illinois to Arkansas*, 26 I. C. C. 135.

¹⁸ *Tap Line Case*, 23 I. C. C. 549.

¹⁹ *Stonega C. & C. Co. v. L. & N. Ry. Co.*, 23 I. C. C. 17.

²⁰ *Cancellation of Joint Rates in Connection with C. Z. & G. R. R.*, 27 I. C. C. 353.

²¹ *Buffalo Union Furnace Co. v. L. S. & M. S. Ry.*, 21 I. C. C. 620.

²² 23 I. C. C. 277.

Incorporation of plant facility, to secure rebate in form of divisions or allowances will not avail. *Colonial Salt Co. v. M. I. & I. L.*, 23 I. C. C. R. 358.

A railway operating a switching service to and from trunk lines may be an interstate carrier. *Auton Piano Co. v. Chicago & St. P. Ry.*, 152 Wis. 156, 139 N. W. 743.

be regarded simply as a cloak or device to effect unlawful results. The question, whether allowances from the published rate made by the roads west of the Mississippi to logging roads or "tap lines," as they are called, owned or controlled by the lumber mills, constituted departures from published rates in violation of the Act to Regulate Commerce, was presented for decision by the Commission in the case of *The Central Yellow Pine Association v. The Vicksburg, Shreveport & Pacific Railroad*,²³ and it was held, that the published rate must be strictly observed; that the defendants were not authorized under the law "to grant a division of the rate to the owner of a lumber mill as compensation to him for the cost of bringing his logs to the mill by steam railroad, horse railroad, wagon, or any other means of conveyance;" and that a common carrier subject to the provisions of the Act to Regulate Commerce can "allow a division of rates *only to another* common carrier which, participating in the particular traffic to which the rate is applied, *is also subject to those provisions.*"

§ 195. Plant facilities.

If the railway performs no part of the through haul, as even the tap lines do, it is merely an integral part of the industry, doing the shipper's work exclusively, and no payment may lawfully be made. This seems clear, for a carrier cannot pay the cost of carriage from a point off its line to a point on its line either for the purpose of getting business that otherwise it would not get, or for the sake of developing new territory. The Commission has long been wrestling with the problem of whether in a given case there is a tap line or a plant facility.²⁴ Following

²³ 10 I. C. C. 193.

A water carrier, owned by shipper is not entitled to through routes and joint rates, though incorporated as a common carrier. *Gulf Coast Navigation Co. v. K. C. S. Ry.*, 19 I. C. C. R. 544. And divisions with a tap line

which does nothing but transport lumber of its owners will be forbidden. *Star Grain & L. Co. v. Atchison, T. & S. F. Ry.*, 17 I. C. C. 338.

²⁴ *Storega C. & C. Co. v. Louisville & N. R. R.*, 23 I. C. C. 17.

the tests suggested above, it has held certain tap lines not to be common carriers at all, but merely plant facilities.²⁵ It has insisted recently that incorporation by an industry of a railroad company to operate its plant tracks does not give carriers a legal basis for relieving the industry of the cost of operating that part of its plant facilities, by division out of the rates of the trunk line carriers.²⁶ In other words, all allowances to plant facilities it tends to regard as illegitimate.²⁷ It makes no difference what form those take, a plant facility cannot have allowance for such service.²⁸ Thus the Commission has held payment of allowances or division to a boat line, which is a mere plant facility, to be an unlawful rebate.²⁹ And, of course, it will not permit a division of a through rate with such services, used simply as a device to evade the law.³⁰ And if a tap line is found to be a plant facility of its proprietary lumber company, it will support a cancellation of joint rates previously in force.³¹ It should be noted that the Commission cannot compel a trunk line to make allowance to an industry under section 15 for services rendered by industrial lines.³² Indeed, if it is a mere plant facility the carrier will not be permitted to make any allowance for the use of a switch.³³

§ 196. Line haul.

Ever since the introduction of the industrial spur, it has been the common practice in this country, and the law taken more or less for granted, that the transportation of carloads under the through rate began with picking up the loaded car on the spur track of the shipper, and ended

²⁵ Tap Line Case, 23 I. C. C. R. 277.

²⁶ *Mfgs. Ry. Co. v. St. L., I. M. & S. Ry.*, 28 I. C. C. 93.

²⁷ *Star Grain & L. Co. v. A., T. & S. F. Ry.*, 17 I. C. C. 338.

²⁸ *Crane Iron Works v. Central R. R. of N. J.*, 17 I. C. C. 514.

²⁹ *Colonial Salt Co. v. M. I. & I. L.*, 23 I. C. C. 358.

³⁰ *Gottro Bros. v. G. & W. R. R.*, 28 I. C. C. 38.

³¹ *Joint Rates with Washington Western Ry.*, 27 I. C. C. 630.

³² *Absorption of Switching Charges at St. Louis*, 32 I. C. C. 100.

³³ *Re Muncie & W. R. R.*, 30 I. C. C. 434.

when spotted at the point designated for unloading on the spur track of the consignee. Such was until recently clearly enough the position of the Commission, and the courts have always upheld rulings based upon this theory. The Los Angeles Switching cases³⁴ in which the Supreme Court handed down the latest opinion on these points is ample evidence of this attitude. In the meantime in the Clearfield Coal District cases,³⁵ the Supreme Court had held that switching movements over industrial tracks may well be part of transportation, if the rate applies to the district, and that consequently making an allowance to the coal companies for performing this part of the transportation was not discrimination in the eye of the Act. The determination that the service performed in switching cars to and from the line is a service performed by the shipper in connection with transportation, depends on two questions. First, what are the limits of the line carrier's transportation service? If the basis upon which the railroad is professing to serve extends up to the door of the proprietary works, when a shipment starts to move from that point, it may be said that the carrier's obligation as such has begun. Second, is the line carrier permitting the shipper to perform a part of this service that otherwise it would be obliged to do? If so, a fair allowance may be made in accordance with section 15 of the Act.

§ 197. Intermingled service.

If any summary of the situation as at present existing should be attempted, it must be realized that, in the way

³⁴ *Interstate Commerce Commission v. Atchison, T. & S. F. Ry.*, 234 U. S. 294, 34 Sup. Ct. 291.

³⁵ *Mitchell Coal Co. v. Pa. Ry.*, 230 U. S. 247, 33 Sup. Ct. 916.

The sweeping ruling in the *Industrial Railways Case*, 29 I. C. C. 212, against allowances for switching was handed down previously to the Supreme Court cases governing this matter cited above; and the modifica-

tion thereof in 32 I. C. C. 129, is to be noted.

Indeed since these decisions the Commission has entered a final order in the *Tap Line Cases*, 31 I. C. C. 490, fixing allowances for all switching services upon a duly graduated scale proportional to the service rendered; see also the *Birmingham So. Ry. Case*, 32 I. C. C. 110.

the Commission has latterly been inclined to view the problem of the industrial railways, the services rendered by industrial railways to their proprietary industries may be any or all of three very different kinds: 1. The industrial railway may be a true common carrier, and thus be in the position of the initial or ultimate carrier as to the shipper industry; but unless the industrial railway is a true common carrier no division of a through rate jointly established can be made. 2. The shipper owning a tap line with the permission of the carrier may perform part of the service that it would otherwise be the line carrier's duty to transport. 3. The character of the trackage may be exclusively that of a plant facility; it may be merely part of the appliances and equipment of the plant, engaged in carrying the raw material in process of manufacture from building to building, or from the plant to the line carrier, thus performing services that the carrier is not undertaking to do, any more than if the carriage were by dray.³⁶ Of course in the matter of allowances or divisions, if so large an amount is paid as to amount to a rebate, or if allowances are made to some and not to others so that there is a discrimination, the Commission theoretically has ample power. Where the line carrier makes only proper payments to these industrial railways for services rendered, no objection may be interposed, provided the service is one which the line carrier is bound by its undertaking of transportation to render.³⁷ If the industrial railway were performing one and only one of the three services outlined above, the problem would be a comparatively simple one. However, such is not usually the

³⁶ In the Tap Line Cases it was held that it was an arbitrary exercise of power for the Interstate Commerce Commission to determine the nature of the service performed by an industrial railway merely by ascertaining whether or not the work was done

for the proprietary industry. 234 U. S. 29, 34 Sup. Ct. 741.

³⁷ In the Butler County Railroad Case it was held that a proprietary tap line if a common carrier was as much entitled to a division of the through rate as any carrier subject to the Act, 234 U. S. 29, 34 Sup. Ct. 748.

case. The carrier is found to be performing at least two of these services, and not only for the proprietary industry, but for others. Thus the line of demarcation between the services it is rendering for which the line carrier should pay, and those which are purely shippers' services becomes difficult and at times impossible to define. And it may be that the problem can never be handled with complete satisfaction until an absolute severance of these services is enforced.

Topic D. Public Duty

§ 198. Public obligation the fundamental principle.

From the very beginning of our law, as has been seen, it has been recognized that some kinds of business were of special importance to the public, and that all persons engaged in such business owed the public peculiar duties. No one could be compelled to enter upon the employment; but if he chose to do so, he thereby undertook the performance of the public duties connected with it. The property which he devoted to the public employment was held to be affected with a public interest, ceasing to be *juris privati* only, as Lord Hale said so long ago. Plainly this is more true to-day than ever before; for the overshadowing importance of the public services in our modern life must be obvious to all. But the extent to which the primary duty of public service may go is just beginning to be appreciated. The duty placed upon every one exercising a public calling is primarily a duty to serve every man who is a member of his public.³⁸ Implicit in this primary duty, necessarily involved in its full performance are various requirements. Not only must all be served, they must have adequate service; not only must they not be charged extortionate rates, but there must be no discrimination practiced. In such an elaborated statement

³⁸ The rails of a common carrier constitute the public highway of modern times. *Bureau v. C., C. C. & St. L. Ry.*, 26 I. C. C. 53. Indianapolis Freight

there is no more than the plain recital of the present recognition of different aspects of public duty. The duty to serve the public is the fundamental principle from which all the rules of public service may be derived.³⁹ In a true sense, therefore, the law governing public service is an entirety.

§ 199. Nature of the public duty.

The fundamental fact in public employment is the public duty which results in all cases from public profession of a public calling.⁴⁰ It is somewhat difficult to place this exceptional duty in our legal system. It is like the contractual obligation in that it is an affirmative duty to act for a certain person; but it is different in that it does not depend upon assent of the party charged. It is like the obligation in tort in that it is imposed by law; but it is not imposed upon anyone against his will as is the obligation in tort. In one sense the obligation to serve the public is voluntarily assumed; and therein the public duty to act differs from the typical duty not to commit a tort, which each person without his ever being consulted owes to all the world. And yet once this obligation is established by his undertaking, his duty extends to all within the profession, however unwilling he may be in a particular case to render service. Public duty is in this sense imposed by law upon those who put themselves into public service; and therein very plainly the situation differs from the typical contractual duty which one owes only in particular cases to the persons with whom he has voluntarily negotiated a previous agreement. If one may thus employ the two traditional phrases, the duty is absolute

³⁹ Being a common carrier is a status existing as a matter of fact; but the Commission can decide by the tests accepted in law whether or not the condition exists. *Cancellation of Joint Rates on C. Z. & G. R. R.*, 27 I. C. C. 353.

⁴⁰ Every common carrier owes a duty to the entire public, and each owes a duty to serve the communities which it reaches with its lines. *Aransas Pass C. & D. Co. v. G. H. & S. A. Ry.*, 27 I. C. C. 403.

rather than relative. For it is a duty imposed by law regardless of dissent in particular instances, not one for which the actual assent of the person obliged is necessary in every case.⁴¹ And yet it must be obvious that in public obligation we have an intermediate case in many respects. It is like a status which one is under no obligation to enter except by his own free will; but, once having committed himself to it, the duties pertaining to that status are devolved upon him by operation of law regardless of his own wishes. However, he is committed to it no further than the peculiar law governing the situation requires.

§ 200. Limitations upon the profession.

Public profession not only establishes public obligation, but it largely determines the extent of the public duty. Just as people cannot be forced to serve unless they have made public profession, so they cannot be forced to serve beyond what their profession covers. There is some authority in the English cases for the proposition that a carrier may limit his undertaking not only as to the nature of the goods carried, but also as to the points between which he will carry certain goods; so that, for instance, a railway having established three stations, and being a carrier of both coal and iron, might be a common carrier of iron between stations 1 and 2 only, and of coal between stations 2 and 3 only, refusing to receive for carriage iron at station 3 and coal at station 1. "He may limit his obligation to carrying from one place to another, as from Manchester to London, and then he would not be bound to carry to or from the intermediate places."⁴²

⁴¹ The obligation of the common carrier to serve is a broad one, and cannot always be performed on that basis which is most advantageous to the carrier. *Rates from Walsenburg Coal Field*, 26 I. C. C. 85.

⁴² *Johnson v. Midland Ry.*, 4 Exch. 367.

Railroads should not be allowed to so divide and diversify themselves by contract and traffic agreements as to work a practical discrimination. *Cedar Hill Coal & Coke Co. v. A., T. & S. F. Ry.*, 15 I. C. C. 73.

This is brought out, although in too extreme a form, by the way in which the question was introduced to the jury by a federal judge, in a recent case.⁴³ "The questions put, therefore, resolve themselves into this: Who shall have control of the operation of the road,—the company or its customers? Who shall determine what the railroad will transport,—the company or the shippers? Who shall say to what points the company will transport goods,—the company or its customers? Who shall say what the means and methods of transportation shall be,—the company or its customers? In short, who shall determine what the business of the company shall be and how it shall be carried on? Solved by the principle of the common law and common sense, it must be the company, as all will agree that no railroad could be operated at all by those who patronize it."

§ 201. Public duty the basis.

The fundamental duty in public employment is to serve all who apply; and this duty has important consequences. Therein public employment differs altogether from private business; and while it is true that a man in ordinary business must be permitted to manage his own affairs in his own way, the argument is not applicable to public callings.⁴⁴ The State may, for instance, dictate the price at which a common carrier must serve, because the law requires the carrier to serve the public properly. It would be idle to lay upon the common carrier the duty to serve all who apply and at the same time permit that carrier to charge any extortionate rate that it might be his fancy

⁴³ *Harp v. Choctaw, O. & G. Ry.*, 118 Fed. 169.

Rails of an interstate carrier must be open from one end to the other with no restriction whatever except such as naturally flows from the right of the carrier to demand and receive a reasonable compensation

for each particular service of transportation. *Rates on Plaster and Gypsum Rock*, 27 I. C. C. 76.

⁴⁴ Equality of opportunity in the use of transportation facilities. In *Re Wharfage Charges at Galveston*, 23 I. C. C. 535.

to fix. To establish the right to regulate rates, and the other rights of the public to regulate the business of common carrier it is necessary to show only the duty of the carrier to serve all who apply.⁴⁵ Although it is commonly said that it is the duty of a public service company to serve all, that is a statement of a principle, not of a rule of law. The fact is that there are many conditions precedent to the obligation of a particular public service company to serve a particular applicant. Those who wish service must put themselves in a proper position to demand service; until this condition precedent is performed there is no obligation to serve. Moreover, in connection with such proper application there must be tender of adequate compensation; for clearly a public service company is not obliged to serve otherwise.

§ 202. Extent of the carrier's route.

A carrier cannot be compelled to receive goods, still less to send and get goods, at a point off his line. Upon this general theory a railroad's obligation to receive freight is for transportation over its own route only. The fact that it has connections with other routes makes no difference; it is not bound to provide any other mode of transportation than its own. Therefore, it need not furnish means to carry merchandise over other routes;⁴⁶ and certainly it need not send cars to fetch freight from other routes. Thus it need not even provide equipment for taking freight from the sidings of other railways very near to its route but not really upon it.⁴⁷ Although the Commission recognizes, as it must, that fundamentally a carrier need not take any thought of service to points off its own rails,⁴⁸ it has been obliged to point out again

⁴⁵ In sections 1, 2, 3, 4 and 5 is the substantive law and machinery for public regulation of interstate carriers. Commutation Rate Case, 21 I. C. C. R. 428.

Morton, 61 Ind. 539, 28 Am. Rep. 682.

⁴⁶ Hoyt v. Chicago, B. & Q. R. R., 93 Ill. 601.

⁴⁷ Laning-Harris Coal & Grain Co. v. A., T. & S. F. R. Co., 12 I. C. C. 479.

⁴⁸ Pittsburg, C. & St. L. Ry. v.

and again that if a carrier enters into through arrangements with other roads it may be involved in service to points beyond its own lines. It is not essential that a carrier actually reach a point to engage in its traffic to discriminate against it.⁴⁹ It has been repeatedly held that while a railroad cannot be compelled to accept and agree to carry goods to points beyond its line, yet it might do so. If the carrier contracts to convey beyond its line, it would be liable as a common carrier for the whole distance.

§ 203. Scope of the service.

A railroad company is bound to take goods only of the class which it has undertaken to carry, but it is obliged to take all freight similar in character to what it has made a practice of handling. Thus a railroad need not handle special trains for the service of construction gangs; and so can make such terms as it pleases. But a steamship line carrying general freight cannot refuse to handle lumber, or even to postpone it for other more profitable freight.⁵⁰ And generally speaking what a railroad handles for some shippers it must take for others without discrimination. In accordance with these principles the Commission has often supported special limitations upon the receipt of particular articles. Thus a rule excluding from transportation benzine, gasoline, and naphtha when contained in wooden barrels was not held unjust. And there are rulings of the Commission to the effect that a common carrier may limit the character of the commodities it wishes to transport, if altogether different from the sort of thing the carrier would normally deal with.⁵¹ Of course,

⁴⁹ *Lagrange Chamber of Commerce v. A. & W. P. R. R. Co.*, 28 I. C. C. 178.

⁵⁰ See particularly *McIntosh v. Oregon Ry. & Nav. Co.*, 17 Idaho, 100, 105 Pac. 66; *Ocean S. S. Co. v. Savannah L. W. & S. Co. (Ga.)*, 63 S. E. 577, 20 L. R. A. (N. S.) 867; *Santa Fe P. & P. Ry. Co. v. Grant*

Bros. C. Co. (Ariz.), 108 Pac. 467; and *Memphis News Co. v. Southern Ry. Co.*, 110 Tenn. 684, 75 S. W. 941, 63 L. R. A. 150.

⁵¹ See particularly *Red C. Oil Mfg. Co. v. A. & V. R. R.*, 21 I. C. C. 542; *Flour City S. S. Co. v. L. B. R. R.*, 24 I. C. C. 179; *In re Express Rates*, 24 I. C. C. 380, and *id.* 28 I. C. C. 316.

a carrier may require that packages containing fragile articles or contained in glass must be plainly marked to indicate contents. And where the shipper refused to state, as required by tariff, the market value of shipment of stocks and bonds, the carrier was under no obligation to transport such securities, and it was its duty to refuse the shipment.

§ 204. Carriage of live stock.

Another prominent matter in the topic under discussion is the carriage of live stock. The carriage of live stock was not ordinarily within the profession of the early carriers as they had no vehicles large enough for such carriage. Therefore when the railways came in, it was doubted in England whether their carriage could be obligatory unless express undertaking with respect to them could be found; and in one American jurisdiction, Michigan, it was decided that this special profession was necessary. But this is not the sort of reasoning that appeals to American courts, and it is now almost universally agreed that live stock constitutes one of the many classes of goods which the modern railway undertakes to carry for the public generally and that the railway is therefore a common carrier of live stock in its freight trains. This was strongly stated in an early Kansas case,⁵² in which the usual functions of the modern railway are thus described: "It can hardly be supposed that they were created for the mere purpose of taking the place of pack-horses, or clumsy wagons, often drawn by oxen or such other primitive means of carriage and transportation as were used in England prior to 1607. Railroads are undoubtedly created for the purpose of carrying all kinds of property which the common law would have permitted to be carried by common carriers in any mode, either by

⁵² The quotation which follows is Nichols, 9 Kans. 235, 12 Am. Rep. from Kansas Pacific Ry. Co. v. 494.

land or water, which probably includes all kinds of personal property.⁵³

§ 205. Carriage of rolling stock.

This general principle that the railways generally must accept for transportation every kind of freight in every form that is appropriate for transportation is well brought out by the case of rolling stock offered for transportation as freight. As is said by a Canadian court⁵⁴ such transportation comes within the general profession of the railroads which "hold themselves out as carriers of all descriptions of property capable of being reasonably and conveniently transported over rails by a locomotive engine, to the extent to which they have the means and accommodations." Although the Commission realizes that carriers may refuse to carry certain classes of private equipment, it holds that if they do so they may not discriminate between private cars owned by different persons.⁵⁵ And, indeed, it has little doubt as to its power to regulate rates upon the movement of cars offered to transportation.

§ 206. Profession limited to car service.

To go to the other extreme of this problem, there is the railway service which the terminal railway provides. These railways not only undertake the carriage of freight exclusively, but often will only take that when offered in loaded cars. The profession of such a road, indeed, is exclusively to transfer loaded cars to and from railway systems. In recognizing this situation the Illinois court⁵⁶ said: "Nor do we see anything in the objection that the business of the company is to be limited to the carrying of freight offered in cars only. Every common carrier has the right to determine what particular line of business

⁵³ See *Interstate Stockyards Co. v. Indianapolis Ry. Co.*, 99 Fed. 472.

⁵⁴ *Greene v. St. John & M. Ry.*, 22 N. B. (P. & T.) 252.

⁵⁵ *Chappelle v. Louisville & N. R. R.*, 19 I. C. C. 456.

⁵⁶ *Wiggins Ferry Co. v. East St. Louis Union Ry.*, 107 Ill. 450, 458.

he will follow. If he elects to carry freight only, he will be under no obligations to carry passengers, and *vice versa*. So if he holds himself out as a carrier of a particular kind of freight, or of freight generally, prepared for carriage in a particular way, he will only be bound to carry to the extent and in the manner proposed. He will nevertheless be a common carrier." And it has recently been held in the federal courts, in dealing with the extent of the jurisdiction of the Commission under the Act, that loaded cars, as well as other property, may be the matter of carriage by a common carrier.⁵⁷

§ 207. Special trains.

Where cars loaded with freight are to be hauled in a special train at special times, not on the regular schedule, and by a special arrangement, the railroad company in so hauling the cars is not a common carrier. This arrangement is commonly made between the owner of a circus and the railroad which transmits the establishment from one place of exhibition to another. The circus is transmitted in a special train, made up exclusively of the circus cars, on a special schedule of time, and for a price less than the regular rates; and the owner furnishes men to load and unload. For such transportation the railroad is not responsible as a common carrier.⁵⁸ "The trains were to be made up entirely of cars which belonged to plaintiff and which the defendant neither loaded nor prepared, and into the arrangement of which, and the stowing and placing of their contents defendant had no power to meddle. The cars contained horses which were entirely under control of plaintiff, and which under any circumstances may involve special risks. They contained an elephant, which might very easily involve difficulty,

⁵⁷ U. S. v. Union S. & T. Co., 192 111, 22 N. W. 215, 56 Am. Rep. 374. Fed. 330. Haulage service was discussed in

⁵⁸ The quotation is from *Coup v. Wharton Steel Co. v. D., L. & W. R. Wabash, St. L. & P. Ry.*, 56 Mich. R. Co., 25 I. C. C. 303.

especially in case of accident. They contained wild animals which defendant's men could not handle, and which might also become troublesome and dangerous. It has always been held that it is not incumbent on carriers to assume the burden and risks of such carriage."⁵⁰

§ 208. Forwarders offering consolidated shipments.

The Commission has long maintained that the Act does not justify the classification of shippers with regard to their interest in property shipped. A carrier, it has said, may not properly look beyond the transportation to the ownership of the shipment as a basis for determining the applicability of its rates.⁶⁰ Its doctrine has been that where shipments belonging to, and ultimately intended for, various consignees have been united in a bulked shipment from one consignor to one consignee, it is unlawful for the carrier to refuse to apply the rate applicable upon the shipment as a whole and to insist upon making a separate charge upon the package or packages intended for each ultimate consignee.⁶¹ However as a matter of the machinery of transportation, naming one consignee for consolidated shipments may be required.⁶² And the Commission has approved various rules applying to rates on shipments consolidated or bulked by agents.⁶³ The federal courts at one time had apparently taken a different attitude, conceding that the carrier had a right to protect itself from competitors in its own line, thus utilizing its facilities.⁶⁴ But it has recently been settled by the Su-

⁵⁰ *Clough v. Grand Trunk Ry. Co.*, 155 Fed. 81, 85 C. C. A. 1, 11 L. R. A. (N. S.) 446.

In one proceeding reparation was denied, since the shipment in question was too long to be loaded through the side door of a box car. *Jones v. Southern Ry.*, 18 I. C. C. 150.

⁶⁰ *California Com. Ass'n v. W., F. & Co.*, 14 I. C. C. 422. See also *Ex-*

port Shipping Co. v. W. R. R., 14 I. C. C. 437.

⁶¹ *California Com. Ass'n v. W., F. & Co.*, 21 I. C. C. R. 300.

⁶² *Davies v. I. C. R. R.*, 19 I. C. C. R. 3 (4) 682½, 918.

⁶³ *Western Classification Case*, 25 I. C. C. 442.

⁶⁴ *Lundquist v. Grand Trunk W. Ry.*, 121 Fed. 915. See also *Johnson v. Dominion Exp. Co.*, 28 Ont. Rep. 203.

preme Court that a carrier cannot, when goods are tendered to it for transportation, make the mere ownership of the goods the test of the duty to carry, and in effect discriminate in fixing the charge for carriage, not upon any difference inhering in the goods or in the cost of the service rendered in transporting them, but upon the mere circumstances that the shipper is or is not the real owner of the goods.⁶⁵

§ 209. The problem of dependent service.

A special problem under the general head of the true extent of public duty is whether, in dealing with dependent services, those who conduct the principal service can make such arrangements as they please with those who apply for such special privileges, or whether there is a public duty in the premises, requiring that equal facilities shall be granted. In the first place it is plain that there is no direct duty owed by the management of the principal service to those who conduct these dependent services. The railroad company surely owes no duty to hackmen who would ply their trade upon station premises, its sole duty is to its passengers.⁶⁶ On the other hand, that there is some public duty in the premises is plain. In the case of the express service the modern railroad owes a duty of some sort in respect to the transportation of small and valuable parcels safely and quickly.⁶⁷ Even when it is once established that there is a public duty toward their own patrons in respect to the subordinate service involved, there remains the conflict of authority as to the extent to which this duty goes. According to the conservative view, the principal company fulfills its duty by making provision for the service desired. Thus a railroad by many

⁶⁵ *Interstate Com. Comm. v. D., L. & W. R. R. Co.*, 220 U. S. 235, 55 L. ed. 48, 31 Sup. Ct. 392, relying upon such cases as *Baxendale v. So. W. Ry.*, 35 L. J. Exch. (N. S.) 108, interpreting similar clauses of

the English act to the same effect.

⁶⁶ *Hot Springs v. Curry*, 64 Ark. 152, 41 S. W. 55.

⁶⁷ *Sanford v. Catawissa R. R.*, 24 Pa. St. 378.

courts is allowed to make an exclusive contract with one hack concern to use the station ground.⁶⁸ According to the progressive view the whole law of public service applies to the situation and any discrimination is therefore condemned. And exclusive contract with one express company for the use of passenger trains is held illegal as a necessary consequence.⁶⁹ The Commission being bound by the conservative view taken by the federal courts has held that such exclusive arrangements are not preferential in the sense of the Act.⁷⁰ And of course it finds nothing wrong with special concessions for private enterprises.⁷¹

⁶⁸ Compare the language in the conservative case of *New York, N. H. & H. R. R. v. Scovill*, 71 Conn. 136, 41 Atl. 246, with the radical conclusions in *Montana Union Ry. Co. v. Langlois*, 9 Mont. 419, 24 Pac. 209.

⁶⁹ For the conservative argument see the *Express Cases*, 117 U. S. 1, 6 Sup. Ct. 542, for the progressive case see *McDuffee v. Portland & R. R. Co.*, 52 N. H. 430.

⁷⁰ The Commission will assume no jurisdiction over exclusive arrangements for baggage transfer on board. *Cosby v. Richmond Transfer Co.*, 23 I. C. C. 72.

⁷¹ Station restaurants, news stands, barber shops and similar private enterprises at railroad terminals are no part of transportation service. *Southwestern Produce Distributors v. W. R. R. Co.*, 20 I. C. C. 458.

BOOK II
LIMITATION OF CHARGES
PART I—THE SCHEDULE AS A WHOLE

CHAPTER V

GENERAL PRINCIPLES GOVERNING COMPENSATION

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§ 210. Provisions of the Act.

The fundamental obligation of the carrier, in connection with commerce subject to the jurisdiction of the Commission, to charge no more than such rate as is reasonable, was in the first section of the original Act; and the wording has only been changed in subsequent amendments to keep pace with the extension of the scope of the jurisdiction of the Commission. Much, however, has been done by adding clauses giving the Commission jurisdiction to pass upon the reasonableness of charges for other services than carriage strictly, as has been seen already. Section 1 as now revised lays it down as a principle that all charges made for any service rendered or to be rendered in the transportation of passengers or property and for the transmission of messages by telegraph, telephone, or cable, as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: Provided, that messages by telegraph, telephone, or cable, subject to the provisions of this Act, may be classified into day, night, repeated, unrepeatd, letter, commercial, press, Government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages: And provided further, that nothing in this Act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers, for the exchange of services. The machinery by which rates are established is described in Chapter XVII.

§ 211. General principles governing reasonableness.

The question of the reasonableness of rates is a complex one. As there are two parties having an interest in the rates, the carrier and the shipper, and their interests are diverse and, to a considerable extent, opposed, a rate which is reasonable from the point of view of one may be quite unreasonable from the point of view of the other. It will be noticed that the interest of the carrier is entirely directed toward framing a schedule of rates which as a whole shall produce a certain return, and so long as the return is realized it is immaterial to him what the proportion of contribution of each individual shipper is to the whole amount.⁷² On the other hand, the shipper is interested in the individual rate charged to him, and in that alone. So long as his rate is a fair one it is immaterial to him that the whole schedule is so arranged as to yield a great profit to the carrier. The reasonableness of the schedule as a whole therefore especially concerns the carrier, that of the separate rate especially concerns the shipper. In order to be entirely reasonable the schedule must as a whole be fair to the carrier, and in detail to each shipper. Here, however, the opposing interests of the carrier and the shipper present a serious difficulty in the working out of the problem of rates. A carrier may be so happily situated as to be able to frame a schedule which will be fair to himself and at the same time just to the individual shippers.⁷³ This, however, is quite likely not to be the case. A schedule may not be possible which will yield fair compensation to the carrier without at the same

⁷² Where the rate is fixed by the legislature or by a commission the most common inquiry is whether the schedule as a whole will bring in a fair income, and it is in such cases that this inquiry is most frequently made. *Chicago & N. W. Ry. v. Dey*, 35 Fed. 866, 2 Int. Com. Rep. 325.

given rate is reasonable or not, is a matter of judgment. The traffic official exercises his judgment in the first instance, and the Commission, when it revises that rate, substitutes its judgment for that of the traffic official. *National Wool Growers' Asso. v. O. S. L. R. R. Co.*, 25 I. C. C. 675.

⁷³ The final answer as to whether a

§§ 212, 213] RAILROAD RATE REGULATION

time exacting an unjust amount from some particular shipper.

Topic A. Certain Limitations Fundamental.

§ 212. Rates must be fair to the company and to the public.

The fundamental principle as to the reasonableness of a particular rate is that it should be fair compensation for the service rendered. There are, therefore, limits within which the railroad company must act in fixing its rates. The company must have reasonable compensation; but the shipper must not be charged more than a reasonable price. The Commission has often said that the carrier is entitled to reasonable compensation and the shipper to a reasonable rate for the service performed.^{73a} The compensation, in order to be reasonable, must be fair to both parties. It is not enough that the whole schedule shall bring in a fair return to the company; the particular rate fixed for carriage must be in itself no more than a reasonable amount for the customer to pay under the circumstances, for the service rendered him. The question of reasonableness involves the element of reasonableness both as regards the company and as regards the public. The Commission is well aware that a continuous process of reducing carriers' revenue would be detrimental to the public interest as well as to carriers.⁷⁴

§ 213. Limitations within which rates must be made.

Stated in more accurate terms, the law requiring fair compensation has two distinct sides. It is desirable that the carrier should receive the full cost to it of performing

^{73a} *Memphis Grain & Hay Asso. v. St. L. & S. F. R. R. Co.*, 24 I. C. C. 609.

Differences in earnings of carriers in different territories considered in determining the propriety of rate comparisons. *Evens & Howard Fire Brick Co. v. St. L., I. M. & S. Ry. Co.*, 25 I. C. C. 141.

⁷⁴ *Union Tanning Co. v. S. Ry. Co.*, 26 I. C. C. 159.

The relative lack of financial prosperity of carriers, considered in determining the reasonableness of a rate. *Michigan Copper & Brass Co. v. D. S. S. & A. Ry. Co.*, 25 I. C. C. 357.

the service. It is desirable, also, that the shipper should not pay more than the value of the service to him. These two limitations are obviously at the extremes within which in normal cases rates must be made.⁷⁵ "The cost of service, while recognized as an important element in classification and rates, is not alone controlling. On that basis some articles, on account of relation of commercial value to cost of service, though furnishing a large volume of traffic, would not be carried at all, and others of high commercial value would have a very low rate without increasing tonnage. Another element of the highest importance, and that cannot be disregarded, is the value of the service to the article carried. This is a factor that largely determines the classification and rates the article will bear in the transactions of commerce, and necessarily qualifies the influence of other factors in the distribution of charges with the view to average reasonable revenue."⁷⁶

§ 214. Unreasonable regulation universally forbidden.

The company performing the service should be protected in getting as a reasonable return for its services, at least what is fairly the cost of those services as a minimum, as the United States Supreme Court has been insisting of late years.⁷⁷ This, however, cannot always be done; in such a case the utmost protection possible must still be given to the company. The balance of interests was well stated by the Interstate Commerce Commission

⁷⁵ The interests of all lines must be considered, and not alone those of the line that can handle the traffic with the least cost; and the interests of the consumer and of the producer must not be lost sight of. *Commercial Club of Superior v. G. N. Ry. Co.*, 24 I. C. C. 96.

⁷⁶ The quotation is from *Thurber v. New York Central R. R.*, 2 Int. Com. Rep. 742, 3 I. C. C. Rep. 473.

⁷⁷ *Interstate Commerce Commission v. Stickney*, 215 U. S. 98, 30 Sup. Ct. 66.

It should be noted that the Commission has no power under the Act to fix minimum rates for the protection of a competitor; its jurisdiction is confined to fixing maximum rates for the carriers involved in the proceedings before it. See *Norfolk & W. R. R.*, 195 Fed. 953.

thus:⁷⁸ "It is vitally important to the development of this country that the service performed by our railways should be efficient and complete. The wealth invested in these enterprises should be sacredly protected, and no unnecessary burden should be imposed in the way of public supervision. But it is equally important that the rates charged for the service should be just; and, in view of the monopolistic conditions under which these rates are now made, the public has no protection save by regulation by the Government."

§ 215. Value of the services constitutes maximum.

The value of the services to the customer constitutes the limit of charge which the company is permitted to make. Considering all the circumstances, if the services have a certain value to the consumer and no more, the carrier must charge no more. The elemental principles thus far noted may be summarized as, on the one hand, the right of the company to derive a fair income, based upon the fair value of the property at the time it is being used for the public, taking into account the cost of maintenance or depreciation, and current operating expenses; and, on the other hand, the right of the public to have no more exacted than the services in themselves are worth.⁷⁹ "While the company is entitled, so far as this case shows, to a fair return upon the value of the property used for the public at the time it is being used, the public (that is, the customers) may demand that the rates shall be no higher than the services are worth to them, not in the aggregate, but as individuals. The value of the services in themselves is to be considered, and not exceeded. These views seem to be

⁷⁸ The quotation is from *Re Proposed Advances in Freight Rates*, 9 I. C. C. 382.

The Commission cannot be unmindful of the serious effect upon the revenues of the carriers when reduc-

tions therein proposed. *Anadarko Cotton Oil Co. v. A., T. & S. F. Ry. Co.*, 24 I. C. C. 327.

⁷⁹ The quotation is from *Kennebec Water District v. Waterville*, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856.

consonant with reason. They are also established by the highest judicial authority in our country.”⁸⁰

§ 216. Interests of the companies to be considered.

However desirable it may be to provide lower rates for the public that is receiving the service, it is equally necessary to leave a reasonable return to the company that is performing the service. In some cases where a rate has been fixed by the State the court when it is called upon to pass upon it may find that both interests are sufficiently protected; but in others it may be found that the constitutional rights of the company have been ignored in the desire to grant a lower rate to the public. The court found this in *Metropolitan Trust Company v. Houston & Texas Central Railway*,⁸¹ “As popularly expressed, the rights of the people—the rights of shippers who use it as a carrier—have to be regarded; but, as judicially expressed, these last have to be so regarded as not to disregard the inherent and reasonable rights of the projectors, proprietors, and operators of these carriers. It is settled that a State has the right within the limitation of the constitution, to regulate fares. From the earliest times public carriers have been subject to similar regulations through general law administered by the courts, requiring that the rates for carriage should be reasonable, having regard to the cost to the carrier of the service, the value of the service to the shipper, and the rate at which such carriage is performed by other like carriers of similar commodities under substantially similar conditions.” The cost of the service in carrying any one particular shipment may be difficult to determine, but the cost to the carrier of receiving, transporting, and delivering the whole volume of tonnage and number of passengers in a given period of time must include, as

⁸⁰ The shipping public has a right to enjoy reasonable rates, and the private interests of a carrier cannot defeat or qualify this right. *Wichita*

Board of Trade v. A., T. & S. F. Ry.,
25 I. C. C. 625.

⁸¹ 90 Fed. 683.

one of its substantial elements, a return on the value of the property used in the service. As the Commission has recently said it is necessary that carriers be permitted to charge rates that are fully compensatory for the service they perform, so long as they are not unreasonable.⁸²

§ 217. Interests of the public to be considered.

That there are in reality two tests, not one, is pointed out by the most discriminating judges in the more recent cases, and it is the avowed policy of the United States Supreme Court that both parties to the service, the carrier and the shipper, should be considered in deciding all cases. Thus, in the leading case of *Smyth v. Ames*,⁸³ the court, in declaring the Nebraska maximum freight law unconstitutional, guarded itself against being understood as taking an extreme position in favor of the carrier by saying: "It cannot therefore be admitted that a railroad corporation maintaining a highway under authority of the State may fix its rates with a view solely to its own interests and ignore the rights of the public. But the rights of the public would be ignored if rates for transportation of persons or property on a railroad are exacted without reference to the fair value of the property used for the public and the fair value of the services rendered, but in order simply that the corporation may meet operating expenses, pay the interest on its obligations, and declare a dividend to its stockholders."⁸⁴ And in *Covington & Lexington Turnpike Road Company v. Sandford*, the court, in questioning the State legislation, said similarly: "A corporation is not entitled as of right and without reference to the interests of the public, to realize a given per cent. upon its capital stock. Stockholders are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored. The public cannot properly be

⁸² *Morgan Grain Co. v. A. C. L. R. R.*, 19 I. C. C. 460.

⁸⁴ 164 U. S. 596, 41 L. ed. 556, 17 Sup. Ct. 198.

⁸³ 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. 418.

subjected to unreasonable rates in order simply that stockholders may earn dividends."

§ 218. Accommodation of the interests of both sought.

The effort of the law, therefore, is to accommodate the more or less conflicting interests of the companies and of the public. The rule that the company is entitled to demand a fair return, upon the reasonable value of the property at the time it is being used for the public, is on the basis of taking the actual cost of the plant and its annual depreciation, and of allowing a fair profit on that footing over and above expenses. But while it is strictly true that the company is entitled to no more than a reasonable return upon its necessary investment, which is embodied in the structure and its natural increment, if any, that goes but a little way towards the solution of the problem, owing to the difficulty of saying just what is reasonable for the shipper to be charged in a given case. That must, for the most part, be left to the good judgment of the tribunal which passes upon each particular case. Only the other day, the Commission in the Five Per Cent Case revised its former conclusions,⁸⁵ to the effect that, although the railroads were not perhaps getting enough in way of earnings, they could by making charges for services furnished without adequate compensation, and by instituting further economies of operation, make their net income sufficiently large without resorting to direct increases in rates on a large scale. But between August and December of this memorable year the financial situation changed so unexpectedly that the Commission came to the rescue of the earnings of the carriers appreciating that the means of transportation are fundamental and indispensable agencies in our industrial life, and for the common weal should be kept abreast of public requirements.⁸⁶

⁸⁵ Interstate Commerce Commission, Aug. 2, 1914.

⁸⁶ Interstate Commerce Commission, Dec. 18, 1914.

§ 219. The complexities of the general problem.

So many considerations must be taken into account in passing upon rates that the problem is always a complex one. The difficulties, many of them, arise from the desire to give scope to a variety of principles which must inevitably come into a more or less irreconcilable conflict.⁸⁷ "When a controversy arises between the public and a carrier, the question of the reasonable limit of a rate usually involves many considerations, and is often difficult to determine. A rate that might be regarded as reasonable and just by a producer and shipper, might, from a carrier's standpoint, be deemed extremely unreasonable and unjust, and so, conversely, a rate that a carrier might claim to be reasonable in itself, and that it might support with strong reasons based upon the cost of the service, the quantity of the business and the characteristics of its line of road, might exhaust the greater part of the proceeds of the producer's commodity, and be destructive to his interests. It is only stating a truism, therefore, to say there is no recognized test of a rate mutually reasonable for a carrier and for the producer of the traffic. The reasonableness of a rate must consequently be ascertained in every instance in which the question arises, by its relations both to the carrier and to the shipper, and by comparison with rates normally charged for like or similar service."⁸⁸

Topic B. The Schedule taken as a Whole

§ 220. Reasonableness of the schedule as a whole.

The reasonableness of the schedule as a whole depends as has been seen, upon whether it yields a fair return to

⁸⁷ The quotation is from *Delaware State Grange v. New York P. & N. Ry.*, 3 Int. Com. Rep. 554, 4 I. C. C. Rep. 588.

⁸⁸ A rate cannot be discontinued without taking into account its effect upon commercial and industrial con-

ditions, but there is no absolute rule requiring for any reason the indefinite continuance of a rate, for the question is what, under all the circumstances, is just and reasonable. *Green Bay Business Men's Ass'n v. B. & O. Ry.*, 15 I. C. C. 59.

the carrier. This is largely a mathematical question. The carrier is entitled, first, to pay all expenses; which would include both the actual expenses of operation and also certain annual charges that must be paid before any real profit can be realized. He is entitled furthermore to gain a fair profit on his capital invested. The determination of the actual amount of the capital invested may be a matter of some difficulty; once determined, the rate of profit upon that amount of capital is a question which will be determined, generally speaking, by the ordinary business profit of the time and place. A schedule of rates will be reasonable from the point of view of the carrier if it yields him a net profit equal to that which would be realized, as a business question, from any other business where the capital and the risk were the same.⁸⁹ It is necessary in framing a schedule to require a proper amount of concession from all parties concerned. The principles on which the fairness of the whole schedule would be determined will be limited by the requirement of fairness to the individual shippers; and on the other hand the principles on which the reasonableness of a particular rate would be determined may need modification because of the just claim of the carrier to a fair compensation. The examination of the reasonableness of the carrier's rates may therefore involve a study both of the reasonableness of the schedule as a whole and also of the reasonableness of the separate rates.⁹⁰

§ 221. Tests of the reasonableness of a schedule.

As a general rule, therefore, it will be unjustifiable for the government to reduce the total net returns from the schedule as a whole below what will produce a fair return upon a proper capitalization. A general statement as this leaves much undefined; but it is not altogether im-

⁸⁹ See the course of reasoning in refusing to permit the general advances in 1910 in *Advances in Rates, Eastern Case*, 20 I. C. C. 243.

⁹⁰ See the elaborate discussion of certain principles fundamental in rate regulation in *Advances in Rates, Western Case*, 20 I. C. C. 307.

possible to apply it to particular conditions. As an illustration of the actual way in which the problem is handled an extract is made from one of modern cases which are establishing a practicable method of dealing with this intricate problem. In passing upon the constitutionality of the reduction of rates ordered by a State Commission in *Matthews v. Board of Corporation Commissioners*⁹¹ Judge Simonton said: "The questions made in this case are federal questions and grow out of the Fourteenth Amendment. If the rates fixed are unreasonable, that is to say, if they compel the railway company to conduct its operations at a loss or without a fair remuneration for its investment,—then the property of the company is taken and used by the public without just compensation, and it is deprived of its property without due process of law. The jurisdiction of this court depends on the federal question. It is its duty, as it is the duty of all courts, State and federal, to see to it that no right secured by the supreme law of the land is impaired by legislation acting directly on the subject, or through agents created by legislation."⁹² The law applicable to this case has been settled by a series of decisions of the Supreme Court of the United States. On the other hand, the public cannot require the corporation to use its plant, its money, and its credit without remuneration. The best interests of the public forbid this. Railroads are the arteries of trade. Through them flows the life blood of a community. The best statesmanship contributes to their maintenance and encourages their prosperity. What the remuneration shall be depends upon the circumstances of each case."

§ 222. Many elements to be taken into account.

That these various elements are all taken into consideration in passing upon the reasonableness of a schedule of

⁹¹ 106 Fed. 7.

⁹² The carrier is entitled to ask a fair return upon the value of property devoted to public use; public is

entitled to demand rate not higher than the services are reasonably worth. *Morgan Grain Co. v. A. C. L. R. R.*, 19 I. C. C. 460.

rates may be shown by extracts from some leading cases. Wages, price of materials and supplies, greater amount hauled by trains, destiny of traffic, as affecting cost of operation, and cost of operation are first of all to be considered as the Commission well realizes.⁹³ But the test is more elaborate since the fixed charges must also be considered in addition to the operating expenses. As one court has comprehensively said: "Ordinarily that is a reasonable charge or system of charges which yields a fair return upon the investment. Fixed charges and the costs of maintenance and operation must first be provided for, then the interests of the owners of the property are to be considered. They are entitled to a rate of return, if their property will earn it, not less than the legal rate of interest; and a system of charges that yields no more income than is fairly required to maintain the plant, pay fixed charges and operating expenses, provide a suitable sinking fund for the payment of debts, and pay a fair profit to the owners of the property, cannot be said to be unreasonable."⁹⁴

§ 223. Relation of a particular rate to a whole schedule.

The general method in passing upon the reasonableness of rates is therefore to discover whether the particular rate is fair, judging the schedule as a whole. As has been seen, this involves the consideration of many factors, some of them conflicting, but it may be said that rates fixed are fair to the company if from the schedule as a whole it gets a reasonable return, and fair to the people served if they pay in each particular case no more than the service is worth.⁹⁵ In order to meet, as far as may be, both requisites, a particular rate should seldom be passed upon without considering the relations to the schedule

⁹³ *Commercial Club of Salt Lake City v. A., T. & S. F. Ry.*, 19 I. C. C. 218.

⁹⁴ 179 Pa. 231, 36 Atl. 249, 36 L. R. A. 260.

⁹⁵ *Brewer & Haulerter v. Louisville & N. Ry.*, 7 I. C. C. 224.

as a whole, especially as the reasonableness of one rate may be judged with reference to other rates in the same schedule. An example of the way in which such problems are worked out, considering all factors and then giving most weight to one held to be controlling in the particular case, may be seen in various cases before the Interstate Commerce Commission.* "To inquire whether the revenues of this railway company might be or ought to be reduced below the present point would raise several interesting and important questions, for the consideration of which we have not before us in this case the necessary data. We are furnished with a statement of the funded debt and capitalization of the road, and also with a statement of its financial operations for the last year. We are not informed how this debt was created, what it would cost at the present time to replace the property represented by this capitalization, nor what that property is fairly worth, if indeed there be any standard by which its value can be measured."

§ 224. Conclusion as to proportionate rate.

As a result of these considerations, the conclusion may be drawn that a proportionate rate must be established for each article of traffic. This rate will be fixed according to the share of the entire burden of charge which ought reasonably to be borne by that particular article. In determining the reasonable share of the burden to be borne by an article, various considerations must be weighed, and the rate when finally established will be determined as a result of all such considerations. It must be clear, therefore, that the establishment of the particular rate is not, like the establishment of the general schedule of charges, a matter which can be tested by a mathematical

* Reduction opposed because it would mean serious reduction in the revenues, and statement offered to show that roads in the southwest are

not prospering. *Texarkana Freight Bureau v. St. L., I. M. & S. Ry. Co.*, 28 I. C. C. 569.

formula. The division of rates among the particular commodities involves judgment and experience; it is not an exact division, but only the closest possible approximation to fairness. Thus in speaking of the requirement of the Federal Interstate Commerce Act of 1887, section 1, that rates should be reasonable and just, the Interstate Commerce Commission has said:⁹⁷ "The words 'reasonable' and 'just' as used in the Statute, as applied to rates, are each relative terms. They do not mean to imply that the rates upon every railroad engaged in interstate commerce shall be the same or even about the same. The conditions and circumstances of each road surrounding the traffic and which enter into and control the nature and character of the service performed by the carrier in the transportation of property, such as the cost of transportation, which involves volume or lightness of traffic, expenses of construction and of operation, competition in some respects of carriers not subject to the Law, rates made by shorter and competing lines to the same points of destination, space occupied by freight, value of freight and risk of carriage to carrier, all have to be considered in determining whether a given rate is 'reasonable' and 'just.'" ⁹⁸

§ 225. Company cannot make unreasonable rates.

The requirement that no person may be charged more than a reasonable rate may be insisted upon although the result is that the company does not get a fair return from its schedule as a whole. Those who undertake a public employment enter upon a business affected with a public interest, which justifies the State in demanding that the rates charged shall be reasonable to the public. A test

⁹⁷ The quotation is from *New Orleans Cotton Exchange v. Illinois Cent. R. R.*, 2 Int. Com. Rep. 777, 3 I. C. C. Rep. 534.

⁹⁸ The difference in the character of testimony required to test the reasonableness of an entire schedule

of rates covering the whole traffic of a particular carrier and that required to test the reasonableness of a rate on a particular commodity between two definite points considered and discussed. *Frye & Bruhn v. Northern P. R. Co.*, 11 I. C. C. 501.

case upon this point was *Missouri Pacific Railway v. Smith*,⁶⁰ where maximum rates were fixed by the Legislature which the plaintiff railway company claimed would cut off all the profits of their business. The court held that this was not fatal to the constitutionality of the legislation; Mr. Justice Thomason saying: "Rates of transportation sufficient to enable the road to realize a sum large enough to defray current repairs and expenses and pay a profit on the reasonable cost of building the road and equipping it, ought to be reasonable. The earnings of a road might be sufficient for this purpose, and yet not large enough to pay expenses and interest on its debts. Large and unnecessary debts might have been contracted through extravagance, enormous salaries, and mismanagement, exceeding the cost of building and equipping the road, and bearing a rate of interest amounting to more than a reasonable profit on the capital necessary, when judiciously expended, to construct and equip the road. Like some individuals as to their business, railway companies can reach a point through extravagance, losses and mismanagement, when no reasonable rate of profit will enable them to maintain their roads and pay the interest upon their debts, and when failure and a sale of the road to other parties become inevitable."¹

§ 226. Company cannot justify exorbitant profits.

On the other hand, it is certain upon fundamental principles that the company cannot justify exorbitant profits by urging that the rates are reasonable in themselves. At first impression this has seemed to some persons unjust to the company; but it should be remembered that the company is still allowed a fair return upon its reasonable capitalization, which is all the right that those who have entered upon these enterprises have by established law. If it is found that rates may be reduced to a point which seems below the reasonable standard and yet produce a

⁶⁰ 60 Ark. 221, 29 S. W. 752.

¹ See *Cary v. Eureka Springs Ry.*,
7 I. C. C. 286.

fair return, the company has no legal grievance if it is not permitted to charge higher rates. To quote a specific illustration: ² "The rate per ton mile, while often instructive, is not by any means a fair index of a reasonable rate. The cheapest traffic is frequently the most profitable to the carrier. For the year ending June 30, 1901, the average receipts per ton mile upon all kinds of traffic over the Chesapeake & Ohio System, embracing about 1,500 miles, was 3.88 mills. The percentage of operating expenses was 62.87—much below the average of the whole United States and among the very lowest. Its net earnings were \$3,656 per mile, equivalent to 6 per cent. interest on \$60,000 per mile—just about the average capitalization of all our railroads. This example is referred to as showing that business may be profitably done at astonishingly low rates. Indeed, it is usually a question, not of the absolute rate, but of the conditions under which the traffic is handled." ³

§ 227. Special circumstances affecting the particular rate.

There may be special circumstances connected with a particular transaction which increases or decreases the cost of service; and the effect of such circumstances on the rate must be considered. For instance, the expense of constructing a mountain branch may be very much greater than that of building the main line; or the population served by the company may in places be so sparse as to make the cost of operation very great in proportion to the service demanded.⁴ All these circumstances may properly affect the rate charged in those portions of the territory

² Re Proposed Advances in Freight Rates, 9 I. C. C. Rep. 382.

³ In fixing rates an express company should not be allowed to charge more than a railroad company for the same service. In re Express Rates, 24 I. C. C. 380.

⁴ While earnings may be considered

in fixing a reasonable rate, rates cannot be fixed on this basis alone; sometimes what is a fair rate will not leave sufficient earnings, sometimes it will result in large earnings. Hooker v. Interstate Com. Comm., 188 Fed. 242.

served by the company; yet it appears unjust to place the whole burden upon such territory, thus accentuate its poverty, and place another handicap upon it in the effort to become prosperous. Not all the extra cost of service should be placed upon the particular customers. At the same time, many things besides the mere mileage run must be considered in fixing the rates. A uniform mileage rate imposed upon all railroads would be in reality unequal and unjust. As Mr. Justice Morse said in *Wellman v. Chicago & Grand Trunk Railway*:⁵ "If no classification can be made, and the maximum rate must be fixed the same for all, then the law is admitted to operate unequally and unjustly, because some companies are to less expense than others in the same length of road by reason of the nature of the country through which they run; some have costly terminal facilities, and some have not; some owe large amounts, and some do not; and some do a large amount of business, and some do not."

Topic C. The Particular Rates Considered Separately

§ 228. Reasonableness of the separate rates.

The question of the reasonableness of any separate rate is a much more complex one. The individual shipper ought not to pay more than his fair share of the whole amount received by the carrier; and what his fair share may be depends upon the nature of the goods carried, the expense of carrying them as compared with the carriage of other goods, and other similar considerations.⁶ On the other hand, fairness to the shipper requires that under no circumstances should he be forced to pay a rate greater than the value of the service rendered to him by the carrier, and this involves a determination of the value to him individually of the carriage, and also of the cost to the

⁵ 83 Mich. 592, 47 N. W. 489.

⁶ It is fallacious to place reliance upon ton-mile earnings as basis of rate-making; much of profitable

freight carried is that which yields lowest rate per ton per mile. In re *Advances on Coal to Lake Ports*, 22 I. C. C. 604.

carrier of the particular carriage. It is obvious that all these considerations, which taken together enter into a determination of the reasonableness of the separate rate are rather vague, and that it will in the ordinary case be a matter of great difficulty to determine the question.⁷

§ 229. Schedule as a whole may throw light.

The gross income from the schedule as a whole may, however, be considered under some circumstances in determining the reasonableness of the particular rate.⁸ That railroad investments may be as secure as other property, the Commission will be inclined to be liberal in allowing reasonable rates, until earnings are sufficiently large for a fair return on actual expenditure.⁹ In determining reasonable rates, the requirements of operating expenses, bonded debt, fixed charges, and dividend on capital stock from the total traffic, are all to be considered; but the claim that any particular rate is to be measured by these as a fixed standard, below which the rate may not lawfully be reduced, is one rightly subject to some qualifications, one of which is that the obligations must be actual and in good faith.¹⁰ For example upon investigation of certain advances in rates, the Commission found that measured by some of the principal tests that experience has taught it to apply—the per car earnings, the rate per ton mile, volume and value of traffic, rates from and to similar points moving under substantially similar circumstances and conditions—the advance did not appear to be unreasonable.¹¹

⁷ On no traffic, except it be lumber, are per ton-mile earnings more helpful in the determination of a reasonable rate than on grain. In re Investigation of Advances in Rates on Grain, 21 I. C. C. 22.

⁸ Jerome Hill Cotton Co. v. Missouri, K. & T. Ry., 6 I. C. C. Rep. 601.

⁹ Newland v. Northern P. R. R., 4 Int. Com. Rep. 474, 6 I. C. C. Rep. 131.

¹⁰ Re Rates and Charges on Food Products, 3 Int. Com. Rep. 93, 4 I. C. C. 116.

¹¹ In re Advances on Cement, 22 I. C. C. 90.

§§ 230, 231] RAILROAD RATE REGULATION

§ 230. Bearing of tariff as a whole.

Under the power given in the Act originally to pass on the question of reasonable rates, the Commission seldom had to consider the schedule as a whole; each case presented to the Commission was that of a particular rate, and the considerations which determine the reasonableness of a particular rate are seldom those which determine the reasonableness of the entire schedule of rates. The capital account of a railroad does not necessarily furnish a criterion by which the reasonableness of its freight rates is to be determined; and if the capitalization is to be considered in cases involving the readjustment of rates, it must be accompanied by a history of the capital account.¹² The mere fact of the need of additional revenue to meet additional expenses without diminishing net income does not justify an advance in a particular rate.¹³ The financial necessities and conditions of a carrier are not controlling to the extent that, independent of other circumstances, any rates are reasonable until the earnings are sufficient to operate the road, and meet all the obligations of the carrier.¹⁴ Among the considerations to be weighed in determining what is a reasonable and just rate are included the general financial and physical conditions of the carrier, the character of the commodity in question, whether it constitutes a large or small part of the business of the carrier, whether it is economical or expensive to handle, how it compares with other commodities hauled, and, as evidencing the railroad's own judgment, whether a different rate has been in effect on this commodity at some time or other.¹⁵

§ 231. Rule of proportionality in sharing costs.

In what may fairly be called the more enlightened cases

¹² Grain Shippers' Asso. v. Illinois C. R. R., 8 I. C. C. 158.

¹³ Tift v. Southern Ry., 10 I. C. C. Rep. 548.

¹⁴ Jerome Hill Cotton Co. v. Missouri, K. & T. Ry., 6 I. C. C. Rep. 601.

¹⁵ Thompson Lumber Co. v. I. C. C. R. R. Co., 13 I. C. C. 657.

it is now appreciated that the imposition of disproportional rates is in itself improper. As an abstract matter certainly the fairest way to determine the cost of any particular service would be to apportion ratably the total disbursements of every sort to the various items of traffic, and so to arrive at proportionate rates. Theoretically, it is clear, any other method is less just to all concerned. In determining what is a reasonable rate for services rendered, it is hardly proper to take the road as existing and as maintained, with its track and terminal equipments, salaries and all other expenses, and to regard as the total cost of any particular service merely the increased expense necessary to add to its business the service in question; truly the cost of that service ought to include its fair share of the interest on investments and of the general expenses.¹⁶ Upon principle, therefore, a proportionate rate should be established for each article of traffic. This rate will be fixed according to the share of the entire burden of charge which ought reasonably to be borne by that particular article.¹⁷ In determining the reasonable share of the burden to be borne by an article, various considerations must be weighed, and the rate when finally established will be determined as a result of all such considerations.

§ 232. Average cost always modified.

In the determination of rates upon the basis of proportionality the average cost of service must play an important part. The ton-mile cost of moving freight on the railroad in question must be considered always.¹⁸ But the

¹⁶ See particularly, *Pennsylvania Ry. Co. v. Philadelphia County*, 220 Pa. St. 100, 68 Atl. 676, 15 L. R. A. (N. S.) 108.

Fairest test of reasonableness of rates is earnings per car-mile and per train-mile. In *re Advance on Coal to Lake Ports*, 22 I. C. C. 604.

¹⁷ See particularly, *Gulf, C. & S. F. R. R. Co. v. Railroad Commission (Tex.)*, 116 S. W. 795.

Averages are helpful in determining proper relation of rates or proper basis for their construction. *Victor Mfg. Co. v. S. Ry. Co.*, 21 I. C. C. 222.

¹⁸ See particularly, *Atlantic C. L.*

average cost of service is at best only a standard with which to make comparisons. As a practical matter some factors are present in every particular case which will either raise or lower the actual cost in its relation to the average cost. Thus the establishment of a ton-mile rate as a standard merely brings rates down to the narrowest point of scrutiny, and for that purpose is valuable; but it excludes consideration of other circumstances and conditions which enter into the making of rates, no matter how compulsory or imperious they may be, and it cannot, therefore, be accepted as altogether controlling in determining the reasonableness of rates.¹⁹ A particular rate is thus the resultant of many factors. While there are certain economic forces which must be recognized as playing a legitimate part in the establishment of a particular rate, it is the office of the law to interfere to prevent the working out of these forces in an oppressive way.

§ 233. Application of both tests necessary.

It must therefore be assumed, as the basis of further discussion, that not only is it desirable that the company performing the service should have a fair return, but that it is also desirable that the person served should pay no more than a fair price for the service rendered. And it must be recognized, as in many legal situations, that both of these desirable things cannot be brought about in a particular case very often to their full extent; but that it is a case where concession must be made from each principle. Rate making is not an exact science, but a practical prob-

Ry. Co. v. Florida, 203 U. S. 256, 51 L. ed. 174, 27 Sup. Ct. 108.

The fact that rates upon a certain commodity yield revenue per ton mile higher than the average upon all traffic cannot be accepted as conclusive of unreasonableness of rates. *Coke Producers' Asso. of Connellsville v. B. & O. R. R.*, 26 I. C. C. 125.

¹⁹ See further *Seaboard Air Line Ry. Co. v. Florida*, 203 U. S. 261, 51 L. ed. 175, 27 Sup. Ct. 109.

It is of course fundamental that per ton-mile revenue decreases with increased distance, and sweeping statements as to mileage comparisons are always subject to this modification. *Rates on Linseed Oil*, 26 I. C. C. 265.

lem, which cannot be solved without some compromising of the sort thus described.²⁰ "Counsel representing the western roads in the progress of the investigation insisted that the rate of charges which a road may justifiably and reasonably make on its business largely depends upon how much business it has to do, and that the much greater tonnage on eastern roads indicated the much higher basis of charges necessary to be made and which might reasonably and lawfully be made on western roads; that every road has a right to live and must derive from the business it has to do a sufficient income to meet its obligations, which are to operate its road, pay interest on its indebtedness and a dividend on the capital stock; and that any rates which, with other rates on the same road, taken altogether, do not yield a revenue more than sufficient for these purposes, are neither unreasonable nor unjust to the shipper. We have already shown that some qualification need be made to the rule here laid down as the measure of reasonable rates. The rule insisted upon would involve the right to increase rates as often as a new road was built, where roads were already ample for the business. There are eight roads or lines carrying between Chicago and Kansas City; a less number might do the business as well and cheaper. If eight more were built the rates might need to be doubled if all roads constructed have a right to such income as will meet the obligations of the companies owing them."²¹

§ 234. Service not worth usual amount.

Conversely the managers of public service, who are on the outlook for all the business they can get at whatever price the business will bear, claim the right to make extraordinary reductions to those of their patrons who find the service of less value to them than it would be to the average customer. Thus railroads make extraordi-

²⁰ *Kansas v. A., T. & S. F. Ry.*, 27 I. C. C. 673.

²¹ The quotation is from *Re Freight Rates on Food Products*, 3 I. C. C. 93.

narly low rates for certain commodities of such an inferior grade that at the average freight rate it would not move at all, so disproportionate would the freight charge be to its actual value. Sometimes the railroads go further, and make a lower charge to these who are going to utilize the commodity in further manufactures, and those to whom it is of sufficient value in its present shape.²² This argument in itself is no justification for making disproportionate rates against other members of the public who have no cheaper substitute. It is said for allowing these practices, that provided it is understood that no business shall be done unless there is some margin above the bare cost of operation such additional business will benefit those who must pay the fixed charges to some extent by reducing the average cost of their service. It should be noted, however, that no court has ever suggested that a company which neglected its opportunities to make money by such discriminating rates was doing wrong.²³

§ 235. Service of unusual value.

That the service in question will be of unusual value to the particular patron is no reason why he should be called upon to pay more than any other member of the public should pay. And as a Federal judge recently said, if lumber will bear the advance, that is no reason why it should.²⁴ That business will still be done at the rate charged is no evidence that it is not unreasonable when a public service is in question, although doubtless it would be in the case of a private business.²⁵ The monopolistic conditions which characterize public employment would result in extortionate prices being possible, while in a

²² According to *Hoover v. Pennsylvania R. R. Co.*, 156 Pa. St. 220, 27 Atl. 282, 36 Am. St. Rep. 43, 22 L. R. A. 263, such reductions may be made.

²³ According to *Lumber Co. v. Railroad*, 136 N. C. 479, 48 S. E. 813,

such reductions constitute illegal discrimination.

²⁴ *Tift v. Southern Ry. Co.*, 138 Fed. 753.

²⁵ *Re Proposed Advances in Freight Rates*, 9 I. C. C. 382.

private business the asking of an unreasonable price would simply result in a refusal to do business, since the party quoted the outrageous price could resort to a competitor. The ordinary postulates of political economy are applicable only to private businesses where the law of competition prevails. In the case of public business the law of the land must be invoked to keep charges down to a reasonable level.

Topic D. Bases of Regulation

§ 236. Constitutional limitations upon commission regulation.

For a time after the passing of the original Act there was a period when it was doubtful how far Congress had intended to go in dealing with rates; but the Supreme Court finally decided that the Commission could not go to the length of fixing rates.²⁶ So long as the Commission only had power to investigate the reasonableness of rates brought to its attention, its findings, if not accepted by the carrier, being simply *prima facie* evidence in proceedings subsequently brought in the court for the enforcement of its orders, the question of the constitutional limitations upon its affirmative authority as a Commission acting with delegated powers did not arise.²⁷ Since 1906, as has been seen, the Commission has had the power to fix rates in place of the rates which it finds open to condemnation as unreasonable. And the basic rule of our constitutional law applies, therefore, that to declare that the findings of the Commission shall be taken as conclusive evidence of what is reasonable in the premises would be withdrawing ultimate rights fundamentally guaranteed from judicial inquiry, which cannot be done under our system.²⁸ It follows that, in a suit in the courts to enjoin

²⁶ *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. Ry.*, 167 U. S. 479, 42 L. ed. 243, 17 Sup. Ct. 896.

Interstate Commerce Commission, 206 U. S. 142, 51 L. ed. 995, 27 Sup. Ct. 648.

²⁷ *Cincinnati, H. & D. R. R. v. Hooker v. Interstate Commerce Commission*, 188 Fed. 242.

an order of the Commission fixing charges, on the ground that to enforce the rates fixed would result in what would be confiscation, the hearing now, may include the taking and consideration of evidence other than produced previously.²⁹ Only very recently, therefore, have cases got through to the Supreme Court, involving the bases upon which the rates fixed by the Commission may be set aside; but on the list of the grounds upon which the court will go to the length of overruling the Commission, the violation of the guaranties of the Constitution by action alleged to be under the Act leads all the rest. In determining whether an order of the Commission shall be suspended or set aside, the court will first of all consider all relevant questions of constitutional power or right.³⁰ And, therefore, an order, regular on its face, may be set aside if it appears that the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law.³¹

§ 237. Reasonable rates not necessarily profitable.

It should not be inferred that the rule that regulation of rates shall leave a fair return by way of profit is without exception. There are decisions which show that this is not an inviolable right. A recent Florida case³² will bring this out, where Mr. Justice Carter said of a plea that at the rates imposed by the Commission the company would not make a fair return above operating expenses: "The vice in this method of pleading lies in the fact that the question of reasonableness is made to depend upon the capacity of the rates to yield a net income over and

²⁹ *Missouri, K. & T. Ry. Co. v. Interstate Commerce Commission*, 164 Fed. 645.

³⁰ *Interstate Commerce Commission v. Union P. Ry.*, 222 U. S. 541, 32 Sup. Ct. 108.

³¹ See *Interstate Commerce Commission v. Atchison, T. & S. F. Ry.*

Co., 231 U. S. 736, 34 Sup. Ct. 316.

³² *State v. Seaboard Air Line*, 48 Fla. 129, 37 So. 314. The interests of all lines must be considered and not alone those of the line that can handle the traffic with the least cost. *Commercial Club of Superior v. G. N. Ry. Co.*, 24 I. C. C. 96.

above the cost of constructing and maintaining the road and the payment of fixed charges, whereas circumstances may exist under which rates are reasonable which do not afford a net income above the cost of operation and taxes, or the cost of operation, taxes and fixed charges. The returns set forth a few elements entering into the question as to what constitutes a reasonable rate, and attempt to make these elements controlling; whereas the conditions surrounding the operation of the road may deprive them of controlling force." Consistent with this general conception is the contention supported by some cases that transportation for particular transits may be required to be made according to some general system of rates, producing a fair return for the system as a whole, although it is alleged that in a particular instance loss will result.³³

§ 238. When fair net earnings left.

It has been held in the case of *Minneapolis and St. Louis Railroad v. Minnesota* ³⁴ that the rate on a single class of freight may be reasonable, though it is more or less than the average rate, and though it would, if applied to all freight, produce more or less than a fair return to the railroad company. This was a State rate fixed by the railroad commission and attacked as confiscatory under the Fourteenth Amendment. The railroad did not claim that the reduction of this rate alone would deprive it of a fair return, but only that if the reduced rate were applied to all freights the income of the

³³ *Missouri Pacific Ry. v. Smith*, 60 Ark. 221, 29 S. W. 752. In establishing a reasonable rate the strongest line should not alone be considered; the necessities of a line where the conditions of doing business are less favorable should be considered. *Spokane v. No. P. Ry.*, 15 I. C. C. 376.

³⁴ 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. 901.

See by way of contrast *Pennsylvania Railroad v. Philadelphia Co.*, 220 Pa. St. 100, 68 Atl. 576, holding that to reduce passenger fares so that there was no sufficient profit left in that branch of the business was going too far, although the freight earnings were so large that the business as a whole was amply profitable.

road would be insufficient. The court held the rate legal, notwithstanding this fact, saying that obviously such a reduction could not be shown to be unreasonable simply by providing that, if applied to all classes of freight, it would result in an unreasonably low rate. On the other hand, in the case of *Interstate Commerce Commission v. Stickney*,³⁵ it was decided that a carrier under the Act as amended was entitled to a finding by the Commission that the particular charge complained of was unreasonable before a change could be required. Moreover, as that case held, a charge for a service which did not give the carrier more than a fair profit for performing it, was not unreasonable. For the Commission to attempt to fix a new rate at the out of pocket cost, in place of the existing rate which included a profit upon the service performed, was therefore altogether beyond the statutory limitations upon the power of the Commission. Probably, however, this would not be an invasion of constitutional rights, since the profits of the company taken as a whole apparently remained sufficient.

§ 239. Possibility of increase of business.

The suggestion has been made in some cases that reduction ordered in rates may be justifiable if it appears certain that there will be no reduction in earnings as a result, since the increased business consequent upon the lower rate might more than make good that loss, although of some force from a theoretical point of view, must obviously be acted upon in an actual case with the greatest caution. This was one of the many matters discussed in the important case of *Chicago & Northwestern Railway v. Dey*.³⁶ Mr. Justice Brewer disposed of it in this wise:

³⁵ 215 U. S. 98, 30 Sup. Ct. 66.

The fact that the rate on a particular commodity could be reduced without impairing seriously the revenues of the carrier, standing alone, has little value and forms no basis

upon which to determine reasonableness of rates. *Minneapolis Threshing Machine Co. v. C., St. P. M. & O. Ry.*, 17 I. C. C. 189.

³⁶ 35 Fed. 883, 1 L. R. A. 744 and note.

"Again, it is said that it cannot be determined in advance what the effect of the reduction of rates will be. Oftentimes it increases business, and who can say that it will not in the present case so increase the volume of business as to make it remunerative, even more so than at present. But speculations as to the future are not guides for judicial actions; courts determine rights upon existing facts. Of course, there is always a possibility of the future; good crops may increase transportation business, poor crops reduce; high or low rates may likewise affect; but the only fair judicial test is to apply the rates to the business that has been done in the past, and see whether, upon that basis, such rates will be remunerative, or compel the transaction of business at a loss." ³⁷

§ 240. Making rates compared with levying taxes.

It is a common statement in the discussion of rate making that the situation is the same as in the levying of taxes. This may be used as a figure of speech but it is loose talk at best. There is a certain truth in the principle of charging more against valuable goods than against cheap goods, as has been conceded; but that the carrier can, in analogy to taxation, throw the burden upon the more valuable goods and relieve the cheaper goods in direct proportion to their respective values cannot be admitted. The duty of the carrier is to move all goods at a reasonable price for the service rendered, a matter not to be determined upon any *ad valorem* basis. The wrong to the public in making what the goods will bear the basis of rates is well pointed out in the succinct quotation which follows: "It is not a question of what the traffic will bear, but rather of what the public should bear. Conditions are such that this rate *can* be advanced as between the people who pay it and the stockholders who receive

³⁷ In *Central of Ga. Ry. Co. v. McLendon*, 157 Fed. 961, it was held that a court will not retain the rate

fixed by a commission unless convinced that it will result in reduced revenue.

it. Is the advance right? Every question as to the reasonableness of a rate may present itself in two aspects. First, is the rate reasonable, estimated by the cost and value of the service, and as compared with other commodities? second, is it reasonable in the absolute, regarded more nearly as a tax laid upon the people who ultimately pay that rate? The considerations which determine the first of these aspects are of but little weight in determining the second. Every such inquiry involves the idea of some limit beyond which the capital invested in railways ought not to be allowed to tax other species of property. What is that limit, and how can it be fixed?" ³⁸

§ 241. Governmental regulation best for all concerned.

It may fairly be said that governmental regulation, protecting both the public-service companies and the people whom they serve, ought to be for the best interests of all concerned, if it is a policy which is to commend itself to sober judgment. "The railways of our country have been aptly said to constitute the arteries of the national life. The public official or other person who would grudge to them the large measure of prosperity which their inestimable services to the country deserve is as short-sighted as unpatriotic, as narrow as unjust. While this is true, the mistakes or excesses of zeal or judgment on the part of railway officials may at times make these vast enterprises, ordinarily benevolent, instrumentalities of grave private wrong and communal injury. The framers of the Constitution, though unconscious of the indescribable development in the intercommunication of the people, yet 'prophetic and prescient of all the future had in store,' provided for every contingency when it bestowed upon Congress the tersely expressed but elastic power 'to regulate commerce with foreign nations and among the several States.' Congress had exercised this power, and the righteous orders of the great commission it has primarily entrusted with

³⁸ Re Advances in Freight Rates, 9 I. C. C. Rep. 382.

the tremendous duty should in all proper cases be respected and enforced by the courts of the country. The organic law upon which this power in Congress and in the courts is founded is the sure guaranty to investors in transportation lines against the assaults, whether of the agrarian or the demagogue, the anarchist or the mob. While, on occasion, the railway company or other corporation may suffer a temporary diminution of revenues from an order of this character, the interest of the public, and in the end the interest of the corporation itself, is conserved. In all such cases the general welfare should control. *Salus populi est suprema lex.*" ³⁹

§ 242. Inherent difficulties in accommodating all tests.

Whenever the reasonableness of a particular rate charged for a particular service is brought in question there will often be difficulties in accommodating both of these tests which may sometimes seem inseparable. But these difficulties are inherent in the problem, and it is never justifiable not to take both of these tests into account in passing upon a particular rate in its relations to the schedule as a whole. A good illustration of the way in which this sort of problem must be handled may be seen in the extract from a recent case before the Interstate Commerce Commission, which follows: ⁴⁰ "It is further contended in behalf of the defendants that lumber, considering its character and all the conditions incident to the services rendered in its transportation, was not, at the 14-cent rate in force at the date of the advance, yielding its proper proportion of the revenue required by the defendants to meet their expenses—in other words, that that rate as applied to lumber was not a reasonable rate, viewed from the carrier's standpoint, in that it was not adequately remunerative. The question of the reasonable-

³⁹ Speer, District Judge, in Interstate Com. Comm. v. Louisville & N. Ry., 118 Fed. 613.

⁴⁰ Central Yellow Pine Assn. v. Illinois C. Ry., 10 I. C. C. Rep. 530.

ness in this sense of a rate on a single article of traffic is one of almost insuperable difficulty.”⁴¹

§ 243. Conflicting authorities still persist.

Charging what the traffic will bear will always prove the easiest way to get the proper amount of money, if no legal limitations are put upon this distribution of the burden. To leave the distribution of the burden without law, when the total charge is restricted by law, seems almost stultification. For a disproportionate rate to a particular customer may be more oppressive than a system which, although somewhat too large in its total returns, was one in which he contributed only a proportionate share.⁴² Of course, on actual application neither of these theories would to-day be pushed to its logical extreme, the economists would profess to deplore actual extortion in an individual charge; the lawyer would not demand exact distribution of the burden. Legal restriction to some degree is admitted by the economist; economic modification is recognized to some extent by the lawyer. For practical purposes the various theories may be thus reduced to modifications in various degrees of these two persisting theories.⁴³

⁴¹ Where particular rates on a particular commodity between particular points are challenged, the question of net earnings on the particular lines involved is not important, unless it be shown that the margin of profit is so small on the system's business, as a whole, that a reduction in the particular rates would reduce the whole income below the reasonable profit point. *Board of Trade of Winston-Salem v. N. & W. Ry. Co.*, 16 I. C. C. 12, 17.

⁴² A definite and uniform allotment of funds from the charge imposed for the movement of each character of traffic to provide for interest, dividends, and surplus is not proper. In *re Advances on Coal to Lake Ports*, 22 I. C. C. 604.

⁴³ A prohibitive rate so high that traffic would not move usually condemns itself. In *re Investigation of Advances in Rates on Cement*, 20 I. C. C. 538.

CHAPTER VI

BASIS OF CAPITAL CHARGES

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296. Cost of building up the business.

§ 250. Provisions of the Act.

The Commission had nothing directly to do with the determination of the value of the capital devoted to the service of the public, by the carriers subject to its jurisdiction, until the Valuation Act of 1913 was passed; and since all the items of value which seem to be of interest are set forth in one way or another in this Amendment, extracts from Section 19a are printed at the beginning of this chapter. Additions to capital currently have long been under the jurisdiction of the Commission over accounts, as will appear from the quotations from the provisions requiring returns to be made thereof, extracts from which will be reprinted subsequently. By the Valuation Act the Commission is required to investigate, ascertain, and report the value of all the property owned or used by every common carrier subject to the provisions of this Act. The Commission shall make an inventory which shall list the property of every common carrier subject to the provisions of this Act in detail, and show the value thereof as hereinafter provided, and shall classify the physical property, as nearly as practicable, in conformity with the classification of expenditures for road and equipment, as prescribed by the Interstate Commerce Commission: First, the original cost to date, the cost of reproduc-

tion new, the cost of reproduction less depreciation, and an analysis of the methods by which these several costs are obtained, and the reason for their differences, if any. Second, separately from improvements the original cost of rights of way and terminals owned or used for the purposes of a common carrier, and ascertained as of the time of dedication to public use, and the present value of the same, and separately the original and present cost of condemnation and damages or of purchase in excess of such original cost or present value. Third, separately the property held for purposes other than those of a common carrier, and the original cost and present value of the same, together with an analysis of the methods of valuation employed. Fourth, in ascertaining the original cost to date of the property of such common carrier the Commission, in addition to such other elements as it may deem necessary, shall investigate and report upon the history and organization of the present and of any previous corporation operating such property and upon any increases or decreases of stocks, bonds, or other securities, in any reorganization. Fifth, the amount and value of any aid, gift, grant of right of way, or donation, made to any such common carrier, or to any previous corporation operating such property, by the Government of the United States or by any State, county, or municipal government, or by individuals, associations, or corporations. The scope of these provisions of the Act is discussed at large in Chapter XX.

§ 251. Various theories as to proper capitalization.

In order to decide upon what principles the amount of capital devoted to a public service, and therefore entitled to a return, is to be estimated it is important to examine the various theories which have been brought forward for determining what amount is proper. There is as yet no real agreement among the authorities which have dealt with this problem; but it is desirable that some theory should be found with a sufficient preponderance to be taken

as a working basis in a given situation. For without a basic theory as to proper capitalization, rate regulation is virtually impossible; since unless the charges for return on capital are determined,* it cannot be told whether the receipts from any given business are excessive or not. Many theories as to proper capitalization have been advanced at different times; and, indeed, each of them still has some advocates at the present time. But, various as these are, they may be reduced to four. Thus (1) the outstanding capitalization is by a few still regarded as sacred; while at the other extreme are those who refer everything to what might be shown to be (2) the bare cost of substantial reproduction at the present moment. But to most persons both of these standards seem essentially unfair, either to the company concerned or to the public served. And the real controversy it is submitted is between the two remaining theories, (3) the original cost of the property in question to its owners, or (4) the fair value of the property at the present time. It will be seen that, although these amounts may sometimes nearly approximate each other, there is such an inherent difference between these cases that one or the other must ultimately be adopted in a particular case.

Topic A. Original Cost

§ 252. Actual investment entitled to return.

Actual cost properly considered is the most natural, and in many respects the fairest, single basis for the determination of fair value for rate purposes.⁴⁴ A fundamental principle of public service regulation is that since the public service corporation devotes its property to a public use, it may consequently be required to render the service at reasonable rates of charge. Rates of charge to be reasonable may not be in excess of the fair value of the service,

⁴⁴ A schedule of rates that enables the company to realize no more than this is reasonable and just. Brymer

v. Butler Water Co., 179 Pa. St. 231, 36 Atl. 249, 36 L. R. A. 260.

and may not be higher than necessary to produce a fair return on the property devoted to a public use. This is undoubtedly in the first instance, at least, the money that the company has actually and necessarily invested, i. e., the actual cost. As a general working principle the Commissions generally hold that the original investment, or in the absence of evidence as to that, the cost of reproduction, which probably reflects the original investment more accurately than anything else, may be taken as of primary importance; but neither can be controlling as to the final conclusion, and all available information should be considered, and given such weight as is proper in the case under consideration.⁴⁵ It is submitted, at all events, that this rule that a return may be based upon the total investment made in the construction of the plant from first to last, with certain limitations, may be adopted not unreasonably by a public-service company in making up its own schedule of rates; and it would seem to follow that this should be the basis upon which a Commission would be inclined to act, if given a free hand by the courts.

§ 253. Cost of proper facilities.

The ultimate test of reasonableness with the carrier itself is based upon the return for the use of its equipment and facilities.⁴⁶ If the carriers are to equip themselves with cars, motive power, tracks, and terminals so as to meet the demand for transportation, the shipping public should pay interest upon that investment, and for the maintenance of these facilities.⁴⁷ Thus rates were held not unreasonable in a recent case, when the net earnings on heater cars were apparently no more than a just return upon the value of those cars.⁴⁸ But state-

⁴⁵ The original cost of carrier's property devoted to public use is an element in determining reasonableness of rate. *Portland Chamber of Commerce v. O. R. R. & N. Co.*, 19 I. C. C. 265.

⁴⁶ *National Hay Asso. v. M. C. R. R.*, 19 I. C. C. 34.

⁴⁷ *In re Mine Ratings*, 25 I. C. C. 286.

⁴⁸ *In re Advances on Potatoes*, 25 I. C. C. 159.

ments of increased cost of transportation by reason of higher price of equipment can have little weight, when presented in the abstract, with no attempt to consider corresponding reductions resulting from greater efficiency.⁴⁹ A new line ought to be worth what it cost; and it ought, therefore, to be allowed to earn a fair return upon that amount if properly shown, without interference from the regulating authorities.⁵⁰ And the Commission is very ready to recognize the protection due, under normal circumstances, to the owners of the property devoted to public use.⁵¹

§ 254. What is the actual cost.

The question of what constitutes the actual cost of the plant was raised and much discussed in an important case decided in Massachusetts not long ago.⁵² A statute gave the plaintiff town a right to take the corporate property of the defendant company on payment of the actual cost with interest. The town exercised the right, and this suit was brought to determine the actual cost. The court held in the litigation which followed that the actual cost mentioned in the statute was the actual cost of the plant to the company; and this cost they held to be the amount actually paid to the contractor by the company, although the contractor had done the work under a rather peculiar contract which yielded him a somewhat unusual profit. Mr. Justice Loring said in part: "It is argued by the town that this result amounts to substituting market value for actual cost, and actual cost excludes everything in the nature of a profit. It is true that actual cost excludes everything in the nature of a profit; but what is actual cost to the company includes a profit to the contractor, just as what is actual cost to the contractor in-

⁴⁹ *Hornell & Co. v. C., M. & St. P. Ry. Co.*, 26 I. C. C. 112.

⁵⁰ *Spokane v. N. P. R. R.*, 19 I. C. C. 162.

⁵¹ *Detroit Switching Charges*, 28 I. C. C. 494.

⁵² 180 Mass. 325, 62 N. E. 255.

cludes a profit to the merchants of whom he buys his material." ⁵³

§ 255. Cost enhanced by fraudulent contract.

It is clear that, if the contract is collusively made with the contractor, the company cannot rely on the contract price as the bona fide cost of the plant. If, for instance, the owners of the public service company should, either individually or through an independent corporation, such as a construction company, owned by them, make a contract for the payment of an extravagant price for doing the work, it would doubtless be necessary to go behind the form, and find the sum actually expended in the construction.⁵⁴ But it will be assumed, in the absence of evidence, that the contract was made in good faith and without any ulterior motives. But where securities are issued as bonuses or without any regard to cost they furnish neither a measure nor guide to the value of the property. In one case ⁵⁵ the United States Supreme Court pointed out that against a piece of construction costing not more than \$124,000 securities aggregating \$325,000 were given to the contractor. It is perhaps unnecessary to say, remarked the court, that the contracts were made by the company with persons who at that time controlled its voting power.

§ 256. Construction now thought unwise.

It may turn out in some cases that some parts of the plant will prove of little value in the working of the system at a later time. In fairness it would seem that in such cases the question should be whether the expenditure seemed wise at the time it was made; if so, that expenditure should be considered like any other. It is still a

⁵³ See to the same effect, *Gloucester Water Co. v. Gloucester*, 179 Mass. 365, 60 N. E. 977. 680, 31 L. ed. 841, 8 Sup. Ct. 148.

⁵⁴ *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. 148.

question on the authorities whether the stockholders themselves must not bear the burdens of earlier misfortunes of railroads instead of present shippers.⁵⁶ If a cheaper mode of construction was deliberately chosen with the knowledge that it must later be superseded, the Commission will not permit both the money expended in rectifying the line and the original cost to be charged as capital against the shipping public.⁵⁷ On the other hand, if the money may fairly be said to have been judiciously expended at the outset, it would seem that, although it is now seen that the expenditure might have been more wisely made, the capital charge should fairly remain.⁵⁸ If to-day by the preponderance of expert opinion a better way of laying out a system might have been followed, it still may be true that the construction seemed wise at the time it was done.⁵⁹

§ 257. Equipment long since superseded.

The extreme form of this problem relates to superseded equipment. Take the case of a street railway which is constructed as a horse railway, then at great expense is changed to a cable road, then later at still greater expense is converted to an electric road, and then is obliged by statute to build a subway and place its tracks underground. It may have happened that all these expenditures were provided for by the raising of new capital for which securities are still outstanding. Would it be outrageous to ask that some return on this capital should still constitute a charge upon the present concern? In several cases some respect has been paid to this capitalization long after its tangible results have disappeared, notably in *Milwaukee Electric Railway & Light Co. v. Milwaukee*,⁶⁰ where

⁵⁶ *Meeker & Co. v. L. V. R. R. Co.*, 21 I. C. C. R. 129.

⁵⁷ *Kansas City So. Ry. v. United States*, 231 U. S. 433, 34 Sup. Ct. 125.

⁵⁸ *Wilkes-Barre v. Spring Brook Water Co.*, 4 Lack. (Pa.) Leg. News, 367.

⁵⁹ See *Capital City Gaslight Co. v. Des Moines*, 72 Fed. 829.

⁶⁰ 87 Fed. 577.

District Judge Seaman allowed \$2,000,000 in addition to the actual value of the present properties, making an allowance for the necessary and reasonable investment in the purchase of the old lines and equipments, which were indispensable to the contemplated improvement, and for the large investment arising out of the then comparatively new state of the art of electric railways for a large system.⁶¹

§ 258. Portion of plant not now utilized.

As to such portion of the plant as is not utilized at all in the present operation, the problem is more difficult still. If this is being held in condition to operate in emergencies, which are not altogether improbable, it would seem plain in analogy to the decisions just discussed that it may be included. On the other hand, if it is not devoted to any present use, then it should be plain that allowance should not be made for it in estimating the cost. In this case property no longer of any use should be carried in a separate account, as property should be which is being held for use in the remote future. In accordance with these distinctions a Federal court⁶² has allowed for old gas works superseded but held in reserve, while the Minnesota court⁶³ refused to consider large tracts of land held for possible future freight terminals. These decisions are not necessarily inconsistent. The plant in the first case would be by most business men regarded as sufficiently devoted to the immediate business, while the land in the second case is plainly being carried more as a speculation. Business men would demand a business profit on the whole plant in the first case, but they might well be content to carry without profit unimproved lands, relying upon the appreciation of the property for their ultimate profit.

⁶¹ See also Metropolitan Trust Co. v. Houston & T. C. R. R. Co., 90 Fed. 683.

⁶² Capital City Gaslight Co. v. Des Moines, 72 Fed. 829.

⁶³ Steenerson v. Gt. Northern Ry., 69 Minn. 353, 72 N. W. 713.

§ 259. Treatment of outside investments.

In determining whether rates for transportation are fair, any other business of the corporation than carriage should be excluded, both as to capital and operation. This was so well worked out by the Commission in the Great Northern case as to be worth restatement here. Ore properties belonging to defendant carrier were transferred to an independent company, in exchange for certificates entitling the holders thereof to participate in the profits of said company. These certificates were turned over gratis to the shareholders of defendant; and it was held that, upon a question of reasonableness of rates, this fact could not be urged to deny the right of the shareholders to receive a reasonable income on their stock. The idea of the Commission was that, where the coal lands owned by a carrier are leased to an independent company, which made a profit out of their operation, the carrier should not be permitted to use the value of such property, for the purpose of swelling the amount upon which it may demand an income from rates to be paid by the public.⁶⁴ In a recent case of importance in the Supreme Court,⁶⁵ it was held that the Commission might compel carriers engaged in interstate commerce to report upon financial operations in other lines of activity than those subject to the Act. Thus the investment in amusement parks, if conducted under the same auspices as carriage to and from the park, and the profits from its operation, must be reported, in order that the Commission may be sure there has been no juggling of accounts, in reporting upon the investments in facilities for interstate commerce and the profits derived therefrom.

§ 260. Allowance for unremunerative betterments.

It has strenuously been insisted of late by counsel that

⁶⁴ *City of Spokane v. N. P. Ry.*, 15 I. C. C. 376. *sion v. Goodrich Transit Co.*, 224 U. S. 194, 56 L. Ed. 729, 32 Sup. Ct.

⁶⁵ *Interstate Commerce Commis-* 436.

railroads are being required to expend large sums in certain classes of improvements which do not add to the revenue-earning capacity of the property. Instances are the erection of expensive passenger stations in large terminals, the abolition of grade crossings, the elevation of tracks through towns and cities, the adoption of safety appliances and the like. There is a public demand for these improvements, which often takes the form of a legislative enactment or a municipal ordinance; and it is said that the public which demands all this should expect to pay for the improvement. It is, perhaps, not a solution of the question to say simply that such property is entitled to its return, along with other property. It may be necessary to isolate this property, and permit of the gradual amortization of this form of investment, with the understanding that the sums thus set aside shall not ultimately be capitalized. While it is reasonable to say that such rates may be charged as will permit the accumulation of a fund to take care of charges of this sort, the Commission has indicated that it feels that the stockholders must expect to forego something by way of dividend to this end.

§ 261. Contributions made by the State.

Another difficult problem arises from the fact that in many instances the property of the company in question represents in part contributions by the State. The Government may have given the company the land for its right of way, or it may have made contributions in cash out of which properties have been purchased. It is argued strongly in some quarters that only the property in which the company has invested funds, and not that part which has been donated by the government should be considered in determining reasonable rates. It may be true that actual title and possessions are not always conclusive. The determination of a reasonable rate is ultimately based upon the public policy, which may demand that certain

property to which the company has no title should be included, and certain other property to which the company has title should be excluded. It may well be that the actual investment on the part of the company that is entitled to consideration, regardless of mere title or possession. Take the case of grade separations, for example, should any difference be made between expenditures for a bridge over the right of way belonging to the railroad and the raised approaches on the public highway. If the company has had to stand the whole cost, it should have a return on all; if it has had to pay only 50%, should it have a return on more? At all events, one can no longer feel safe in maintaining that all property devoted to public service must always be protected, without stopping to reason why. The truth of the matter, whether we like it or not, is that such property is held at the disposal of the public on such terms as the public thinks fair.

Topic C. Outstanding Capitalization

§ 262. Capitalization outstanding.

If stock is issued for no real consideration, or for more than the actual consideration received, it clearly cannot be taken as any indication of the capital. This was vigorously said by Mr. Justice Harlan in the leading case of *Smyth v. Ames*:⁶⁸ "It cannot, therefore, be admitted that a railroad corporation maintaining a highway under the authority of the State may fix its rates with a view solely to its own interests, and ignore the rights of the public. The rights of the public would be ignored if rates for the transportation of persons or property on a railroad are exacted without reference to the fair value of the property used for the public or the fair value of the services rendered, but in order simply that the corporation may meet operating expenses, pay the interest on its

⁶⁸ *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. 418.

And see particularly the language

of Mr. Justice Moody in *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. 148.

obligations, and declare a dividend to stockholders. If a railroad corporation has bonded its property for an amount that exceeds its fair value, or if its capitalization is largely fictitious, it may not impose upon the public the burden of such increased rates as may be required for the purpose of realizing profits upon such excessive valuation or fictitious capitalization; and the apparent value of the property and franchises used by the corporation, as represented by its stocks, bonds, and obligations, is not alone to be considered when determining the rates that may be reasonably charged." ⁶⁷

§ 263. Nominal capitalization.

Little if any weight, therefore, is to be attached to the nominal capitalization of the company, even although these shares may now be in the hands of innocent holders. For these holders purchased with imputed knowledge of the public service law by which the State may reduce the rates without unconstitutionality to a point where they will yield no more than a fair return upon actual values. The rule that nominal capitalization is inconclusive in a question as to the validity of a reduction of rates is put strongly in another case ⁶⁸ before the Commission, where Commissioner Prouty said: "The mere capital account of a railroad does not furnish a conclusive basis by which to adjust the amount of its earnings, for the reason, among others, that the capitalization of the railroads of the United States does not represent the actual amount of money invested in the properties, nor the actual value of the properties themselves from any standpoint. There is a continual temptation to increase the liabilities of a railroad company without any corresponding increase in actual value. Whatever of wastefulness or mismanagement there

⁶⁷ There may, therefore, be values which are not represented by capitalization. In re Advances in Rates, Western Case, 20 I. C. C. 307.

Cost of construction as measure

of rate. National Lumber Exporters' Asso. v. St. L., I. M. & S. Ry., 28 I. C. C. 215.

⁶⁸ Grain Shippers' Assn. v. Illinois C. Ry., 8 I. C. C. Rep. 158.

may have been in the construction or antecedent history of the railroad, whatever of jobbery or of thievery, even, is apt to find its way into the capital account until it is eliminated by some process of reorganization. In the reorganization itself, the capitalization has no relation ordinarily to the actual value of the property, but is made to depend upon the convenience or even the whim of those who manipulate the reorganization scheme. To make the capital account of our railroads the measure of their legitimate earnings would place, as a rule, the corporation which has been honestly managed from the outset under enormous disadvantages.”⁶⁹

§ 264. Stock issues often deceptive.

Those who examine into these questions even in the most superficial manner are soon convinced of one thing, and that is that the outstanding stock issues do not necessarily constitute a proper basis for the capital charge. This contention was well disposed of by the Commission in a proceeding respecting certain rates of the Southern Railway;⁷⁰ a part of his opinion follows: “The Southern Railway shows that in the year 1899 it earned nothing upon its \$120,000,000 of common stock, and urges that any order of this Commission which depletes the revenues of that company deprives the owners of this stock of their property without due process of law. This common stock was issued as a part of a reorganization scheme under which the Southern Railway Company came into existence. It does not appear that the persons to whom this stock was originally issued ever paid one dollar in actual value for it. It simply appears that the stock is outstanding. This is not enough. Something more is needed when a claim of this kind is set up than the mere fact of the existence and amount of capitalization. It does

⁶⁹ Capitalization cannot be accepted as representing value. In *re* *Advances in Rates*, Western Case, 20 I. C. C. 307.

⁷⁰ *Danville v. Southern Ry.*, 8 I. C. C. Rep. 409.

not rest in the whim of a reorganization committee in Wall Street to impose a perpetual tax upon that whole southern country. In the year 1899 the Southern Railway earned net about 4 per cent on \$40,000 a mile of the mileage of its entire system. That system extends, as a rule, through sparsely populated territories; no difficult and expensive engineering feats were involved in its construction, nor has it in proportion to its extent many expensive terminals. It will hardly be claimed that the cost of reproducing that property in its present state would equal \$40,000 a mile."⁷¹

§ 265. Bonded indebtedness beyond present values.

It used to be more or less a sentiment that there was something sacred about an issue of bonds, especially when based upon a mortgage of realty.⁷² At all events, few cases go so far as refuse to recognize the validity of the claim to interest upon bonds, even when the security has depreciated. But in *Steenerson v. Great Northern Railway*⁷³ Mr. Justice Canty said: "In determining what are reasonable rates, it is perfectly immaterial whether the railroad is mortgaged for two or three times what it would cost to reproduce it, or whether it is free from incumbrance. To hold otherwise would be to hold that the State or the public have indirectly guaranteed the payment of the mortgage bonds of every railroad. The State may as well guarantee the bonds directly as indirectly. But neither the State nor the public have done either the one or the other. It is immaterial how the property has been split up into different rights, interests, and claims. For the purpose of fixing rates, the holders of all these stand in the shoes of the sole owner of the property, unincumbered. The rights of the bondholders

⁷¹ See the history of the Rhode Island Company in *The New England Investigation*, 27 I. C. C. 560.

⁷² See, especially, *Chicago & N. W. R. R. v. Dey*, 35 Fed. 866, 1 L. R. A. 744.

⁷³ 69 Minn. 353, 72 N. W. 713.

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are no more and no less sacred than the rights of such an owner."

§ 266. Market value of securities.

There have been some remarks in certain opinions which show some disposition to consider the market value of securities. In one of its general opinions upon rate matters the Commission said that the market value of stock should be considered, but such rates will not necessarily be allowed as will guarantee prices at which the stock was brought.⁷⁴ And the Commission will pay little attention to what the history of the capitalization in question has been. It appeared in one proceeding that the Great Northern Railway had in the past distributed its stock issues among its stockholders at par, from time to time, although the market value of the stock was often much above par; but this practice, it was said, could have no bearing upon the earnings to which the company was entitled.⁷⁵ Conversely the fact that a carrier's stock originally sold at less than par cannot be urged on a question of reasonableness of rates to deny the present holders thereof fair dividends therefrom. Nor can the fact that a carrier has issued watered stock be urged, on a question of reasonableness of rates, to deny the right of present holders of the stock to receive reasonable dividends thereon.

§ 267. Securities issued upon reorganization.

A complication frequently met is that the operating company is the result of the consolidation of several previous companies or the reorganization of a previous corporation. In many actual cases both reorganization and consolidation are to be found so many times at various stages of the corporate history of the given concern that the outstanding issues tell little or nothing of real invest-

⁷⁴ In re Advances in Rates, Eastern Case, 20 I. C. C. 243.

⁷⁵ City of Spokane v. N. P. Ry. Co., 15 I. C. C. 376.

ment now devoted to the public service.⁷⁶ A reorganization may mean an increase in the nominal capitalization to placate certain interests, or it may mean drastic elision of securities that represented actual investment. A consolidation similarly may mean increase or decrease in nominal capitalization. Obviously when a holding company is utilized there is a duplication of stock issues, at the very least. And when the consolidation is effected by buying the former properties outright an inflated price is usually paid. When in any of these ways the actual property is buried beneath corporate finance, little respect is to be paid to the outstanding issues as such, but the question should be as to the real values underlying.⁷⁷

§ 268. Capitalization authorized by public authorities.

Special conditions may be found in certain environments which may call for peculiar treatment. Where, for example, there has been an explicit legislation, providing for the validation of certain issues of securities to an amount named, no tribunal, it would seem, would venture to question the action of the legislature. The United States Supreme Court has held in a recent case that, as the capitalization of the company in question had been fixed in part by special legislation, the court would not question the values thus established.⁷⁸ So where the laws of the State have provided that stock could not be sold for less than a price fixed by the public authorities, it would seem that this capital, if duly devoted to the objects designated, has peculiar claims to consideration. And it seems that where bonds are sold at various prices it should be a question of par values; as the discount or premium, if proper, really affects the interest rate, not the capital charge.⁷⁹

⁷⁶ See *Chicago Union Traction Co. v. Chicago*, 199 Ill. 579, 65 N. E. 470.

⁷⁷ See also *State ex rel. v. Railroad Commission*, 137 Wis. 80, 117 N. W. 846.

⁷⁸ *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. 182.

⁷⁹ See *People ex rel. D. & H. R. R. v. Stevens*, 197 N. Y. 1, 90 N. E. 60.

§ 269. The problem of watered stock.

To make the capital account of a public service company the measure of its legitimate earnings would place, as a rule, the corporation which has been honestly managed from the outset under enormous disadvantages. One who examines into these questions even in the most casual manner is soon clear on one point, and that is that the par value of the outstanding stock issues does not necessarily constitute a proper basis for the capital charge. Little if any weight, therefore, is to be attached to the nominal capitalization of the company, even although these shares may now be in the hands of innocent holders.⁸⁰ For, however distressing this circumstance may be, the law must take the attitude that these holders purchased with imputed knowledge of the public service law, by which the State may always reduce the rates without unconstitutionality to a point where they will yield no more than a fair return upon actual values. So notorious is it that outstanding securities may have no relation to actual values, that their par value is hardly regarded by anyone to-day.⁸¹

§ 270. Property acquired from surplus earnings.

Doubts have sometimes been expressed as to the standing of securities issued to stockholders when surpluses have been accumulated. That this process may be stopped for the future by the reduction of rates to a point where no

⁸⁰ The plight of such holders appealed to Judge Hough in *Consolidated Gas Co. v. Willcox*, 157 Fed. 849. But Judge Ross had no sympathy for such holders in *San Diego L. & T. Co. v. National City*, 74 Fed. 79.

In *Southern Pacific R. R. Co. v. Bartine*, 170 Fed. 751, it was said that the fair value of the outstanding securities was one of the elements to be considered.

⁸¹ Allegations as to outstanding

securities are pertinent. *Houston & T. C. Ry. Co. v. Storey*, 149 Fed. 499. But they are inconclusive. *Perkins v. Northern Pacific Ry. Co.*, 155 Fed. 445.

For an excellent recent case in which it is pointed out that fictitious valuations indicated by overissues of securities are to be rejected in dealing with this problem, see *Coal & Coke Ry. Co. v. Conley*, 67 W. Va. 129, 67 S. E. 613.

such surplus will be earned is true. But if at some past time a surplus has been earned and either held as cash or utilized in new construction, an issue of new securities against this would seem to represent capital belonging to the stockholders devoted to the business of the company as much as any other securities paid for by their holders.⁸² "In determining the amount of the investment by the stockholders it can make no difference that money earned by the corporation, and in a position to be distributed by a dividend among its stockholders, was used to pay for improvements and stock issued in lieu of cash to the stockholders. It is not necessary that the money should first be paid to the stockholder and then returned by him in payment for new stock issued to him. The net earnings, in equity, belonged to him, and stock issued to him in lieu of the money so used that belonged to him was issued for value, and represents an actual investment by the holder."⁸³

§ 271. Inquiry into foregone profits.

The Commission has several times said that, when the reduction of rates is asked by shippers, past earnings now represented by surpluses cannot be used as an argument for reducing rates, with a view of returning past exactions to the public.⁸⁴ But it has served notice upon the railroads that they cannot expect to advance their rates to secure a return upon such values.⁸⁵ "We are not here dealing with the value of this property nor with the definition of value, whether value means investment, cost of reproduction, or something else; our position is that a

⁸² See *Logansport Gas Co. v. Peru*, 89 Fed. 185.

⁸³ *Brymer v. Butler W. Co.*, 179 Pa. St. 231, 36 Atl. 249, 36 L. R. A. 260.

⁸⁴ *Kindel v. Adams Exp. Co.*, 13 I. C. C. 475.

⁸⁵ *Advance in Rate Case*,—*Eastern Case*, 20 I. C. C. 243.

Previously the Commission had said that in fixing rates it cannot assume that the surplus accumulated by a railroad has been derived from unreasonable exactions, and establish low rates with a view of returning it to the public. *City of Spokane v. N. P. Ry.*, 15 I. C. C. 376.

railroad may not increase rates upon shippers for the reason and as an outgrowth of the fact that it has accumulated out of rates a balance of profit which has been invested in the property. This investment must take care of itself; it must bring a return for itself, either in increased traffic or in the reduction of expenses of operation. There is no justification for the investment of this surplus if it is to have the effect of increasing the rates upon the shippers over the original line. If the theory is to be recognized that by increasing the value of their property by putting back operating revenue into the property a carrier may as a legal right increase rates, then the shipper is worse off each time he pays a rate which allows a revenue over and above a reasonable return upon the original investment."

§ 272. Existing capitalization hardly excessive.

The only way in which investments in public service corporations could be jeopardized, by any solution of the present problem which has been proposed, would be by proof that the outstanding capitalization is excessive; but, although this has been loudly claimed, the claim can probably not be supported. Various theories for determining capitalization have been suggested, which, as has been seen, may be analyzed into four—the actual investment, the nominal outstanding capitalization, the actual present value, and the cost of reproduction. The law has not as yet made any invidious choice among these, but has considered them all with respect. The Constitution, as its interpretation has been settled by the Supreme Court, secures to the companies the opportunity for a fair return on the actual present value of the property; if hampered improperly in getting this it is said that their property is taken without due process of law. In respect to this test the Commission has pointed out that the present value is certainly as great as the reproduction value, and that the outstanding capitalization is little if at all

greater than this is at the present time. It is true that there are outstanding many billions of securities which did not represent any original cash investment, in other words, "watered stock." But the probabilities are that when the enormous increase in the value of the rights of way and terminal facilities, together with the immense expenditures in improving trackage, roadbeds, grades and structures out of current earnings are all considered, the real value of railroad securities may even be as great as the face value of the securities. However, so disproportionate is capitalization in certain cases, that to some students of the problem who have considered this matter of watered stock attentively it has seemed that the business-like solution would be to have the shares in the corporation without any designated par value, representing simply fractions of the ownership. This theory has been taken up by practical promoters, who frankly admit that the real reason for issuing more in par value than the actual expenditures is so that a return commensurate with the risk may be obtained, should the company succeed. Those who argue to eliminate par values altogether must of course concede the power of the State to reduce rates, so that there shall be no more than a fair return proportionate to the risk upon the actual value of the physical properties at any given time.

Topic C. Present Value

§ 273. Power to set aside a statutory rate.

It must be borne in mind that the problem presented to a court which is asked to set aside an established rate as unconstitutional because it amounts to a confiscation of property is not precisely the same problem as that presented to a court which is asked to pass upon the fairness of a rate established by a railroad or other public service company. If a statutory rate takes property, the property affected by it is not the original investment, but the property actually existent and owned by the company.²⁸

²⁸ See *Cumberland Tel. & Tel. Co. v. Railroad Commission*, 156 Fed. 823.

If it is a taking of property to deprive the owner of a fair return upon it, the return must be unfair as income derived from that actual property. In determining whether the return allowed to the railroad is a fair return on their property, the property is that actually in use at its present value. Where, however, the question is whether the company is exacting too great a return on its investment by means of an unfair schedule, the question is as to the amount actually and bona fide invested. Justifying legislative rates, therefore, is one thing, and holding that unreasonable charges are not being made is quite another matter.⁸⁷

§ 274. Constitutional requirements.

The leading case on this point is *Smyth v. Ames*.⁸⁸ This was a suit to test the constitutionality of certain statutes regulating railroad rates. In the course of his opinion Mr. Justice Harlan said: "The corporation performing such public services and the people financially interested in its business and affairs have rights that may not be invaded by legislative enactment in disregard of the fundamental guarantee for the protection of property. The corporation may not be required to use its property for the benefit of the public without receiving just compensation for the services rendered by it." Proceeding then to discuss the basis upon which the necessary amount of compensation was to be reckoned, he continued: "We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public."⁸⁹

⁸⁷ See *Southern Pacific Co. v. Bartine*, 170 Fed. 725.

⁸⁸ 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. 419.

⁸⁹ Carrier's property devoted to public use as a measure of rate. *City of Spokane v. N. P. Ry. Co.*, 19 I. C. C. 162.

§ 275. Original cost as affecting present value.

It follows from the rule just recited that present value may be shown to be different from actual cost. The true inquiry in constitutional cases is the present value of the plant, and the evidence should be directed to that issue. Without some proof as to that the case must fail. But this does not mean that evidence as to original cost is to be excluded.⁹⁰ "The rates which it would be reasonable for the company to ask depend upon what would be a fair return, under the circumstances, upon the value of the property used—a question which we shall discuss later on. In determining what would be a fair return, undoubtedly the amount of money actually and wisely expended is a primary consideration. Actual cost bears upon reasonableness of rates, as well as upon the present value of the structure as such. It thus bears upon what is a fair return upon the investment, and so upon the value of the property. In estimating structure value prior cost is not the only criterion of present value, and present value is not what is to be ascertained. The present value may be affected by the rise and fall of prices of materials. If in such way the present value of the structure is greater than the cost, the company is entitled to the benefit of it. If less than the cost, the company must lose it. And the same factors should be considered in estimating the reasonableness of returns."⁹¹

§ 276. Going value.

So far as the value of a "going business" is increased by the mere element of good will, it cannot demand a return from the rates charged. "The fact that the business is established is, of course, a material fact in ascer-

⁹⁰ The quotation is from *Kennebec Water Dist. v. Waterville*, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856.

See *State ex rel. v. Seaboard Air Line Ry. Co.*, 48 Fla. 129, 37 So. 314.

⁹¹ Compare *Seaboard Air Line Ry. Co. v. Florida*, 203 U. S. 261, 51 L. ed. 175, 27 Sup. Ct. 109.

See particularly, *State v. Minneapolis & St. L. Ry.*, 80 Minn. 191, 83 N. W. 60.

taining the value of the plant, and especially is this true where the property is being estimated for the purposes of sale or condemnation; but as a basis for estimating profits its significance is less apparent. The merchant who sells an established business may properly place a high value on the good will which he relinquishes to the buyer; but so long as he continues in the enjoyment of the business he has created he does not add the value of the good will to his capital stock in estimating the percentage of his annual profits."⁹² To a certain extent, however, a going business is actually more valuable than the mere physical elements of which the plant is composed. The physical connections of its plant, the cost of fitting it for its purpose, the loss of interest on the investment during construction and until the plant is in complete and lucrative operation, all add an actual value to the plant and are properly included in the construction account and form part of the actual capital employed in the enterprise.⁹³

§ 277. Franchise values.

It should be clear that in estimating the capital upon which a public service company is entitled to a fair return the value of a franchise enjoyed by the company cannot be considered. The value of the franchise is itself based on the capacity of the company to earn profits; and it becomes greater when the earnings of the company are increased. If, therefore, a high rate of income could be justified on account of the great value of the franchise, this fact would in turn enhance the value of the franchise itself and so justify a still higher charge; and there would be no limit to the legal charge of the company which could be enforced should such franchise value be permitted to increase in this way the capital charges. As Mr. Justice Savage said in a Maine case⁹⁴ not long ago in-

⁹² Quoted from *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Iowa, 234, 91 N. W. 1081.

Norwich, 76 Conn. 565, 57 Atl. 746.

⁹³ See also *Norwich G. & E. Co. v.*

⁹⁴ In *Brunswick & T. Water Dist. v. Maine Water Co.*, 99 Me. 371, 59

Atl. 537.

volving this point: "In connection it should be noticed that to say that the reasonableness of rates depends upon the fair value of the property used, and that the fair value of the property used depends upon the rates which may be reasonably charged, seems to be arguing in a circle. If we should say that reasonableness of rates depended solely upon the value of the property, and that value of the property depended solely upon the rates which may be reasonably charged, such would be the case. But neither proposition is true." It unquestionably follows that such franchise values cannot stand in the way of rate regulation. As Mr. Justice Peckham recently said in the Supreme Court of the United States as to a valuation of the property of the Consolidated Gas Company⁹⁵ which included some millions for its franchises: "Its past value was founded upon the opportunity of obtaining these enormous and excessive returns upon the property of the company, without legislative interference with the price for the supply of gas, but that immunity for the future was, of course, uncertain, and the moment it ceased and the legislature reduced the earnings to a reasonable sum the great value of the franchises would be at once and unfavorably affected."

§ 278. Purchase values.

Whether when the plant of a public service company is taken by a city, by eminent domain or by contract, compensation is to be made for the franchises of the company is not entirely clear on the authorities. The question should of course be determined according to whether, in view of the purchase or taking, any value remains in the franchise. Although the company may be compelled to submit to statutory rates which make no account of the existence of a franchise, the franchise may nevertheless be of some value. Even when the rates are so limited,

⁹⁵ *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. 192.

the company is still permitted to receive a return on its capital which is greater than that on a government bond; the ownership of the plant may, therefore, have a certain value which the franchise gives. And if the franchise actually has a value, compensation for it should be made. If, then, a public service company has obtained from the public authorities an exclusive franchise for a term of years, which has been granted in such a way as to form a contract which the State cannot impair, the franchise has obviously a certain value, for the opportunity to make a fair rate of return in a business so safe as this is by reason of its monopoly in a public necessity is worth a certain sum in itself.⁹⁶ But no more than this need really be paid even for such an exclusive franchise, no matter what its present profits may be, since the State may at any time reduce its rates to a fair return upon its actual investment. Even if there is no monopoly, if the franchise is practically exclusive, it presumably has a value, for which the company must be paid if the plant is taken by eminent domain or is bought under a clause in the charter. The value of this franchise is greater or less according to the practical possibility of competition; it is greatest if the franchise is legally exclusive, and grows less as the likelihood of actual competition increases.⁹⁷

§ 279. Tax appraisals.

It is sometimes urged that the valuation placed upon the property of the company for taxation should establish the present value. While it is true that this furnishes some criterion, it certainly is open to show the common fact that assessments on the district in question are

⁹⁶ *Bristol v. Bristol & Warren Waterworks*, 23 R. I. 274, 49 Atl. 974.

Compare *Gloucester Water Co. v. Gloucester*, 179 Mass. 365, 60 N. E. 977.

⁹⁷ *Kennebec Water Dist. v. Water-*

ville, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856.

In case of sale to a city the value of company's contract with the city is to be considered. *Covington Gaslight Co. v. City of Covington*, 22 Ky. L. Rep. 796, 58 S. W. 805.

usually no more than a certain percentage of actual values.⁸⁸ Even its sworn return of tangible property has been held not to estop the company from showing higher value in disputing the reasonableness of legislative rates. But such returns are evidence against the company which seeks to establish higher value. Returns made to local bodies for parts of the physical property do not however prevent the company from showing that the value of the property as a whole is greater than the aggregate of these parts. On the other hand, the State by assessing a value for taxation does not estop itself from reducing that value by later regulation of rates. As the United States Supreme Court recently pointed out in the Consolidated Gas Case⁸⁹ even a franchise tax is a tax on the actual value of the franchise as it exists at any particular time; and the imposition of it is quite consistent with the value of the franchise being subject to diminution by a diminished income as a result of legislation reducing rates. The company may be taxed upon its franchise when by reason of the failure of the State to keep its rates down it is earning an extraordinary amount upon its physical value. But when the State chooses to so reduce the rates that the company can earn nothing beyond the fair value of its tangible property, it will find that it has little or no franchise value left to tax.

§ 280. Development cost.

That there are certain actual costs incurred in developing the business during its early stages, for which costs the utility is entitled to be reimbursed, just as clearly as it is entitled to a return on the physical portions of its plant, seems to be too obvious for argument. The investor must go into his pocket to meet one kind of cost

⁸⁸ *Southern Pacific Ry. Co. v. Railroad Commrs.*, 78 Fed. 236. ⁸⁹ *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. 192.
See also *Louisville & N. Ry. Co. v. Brown*, 123 Fed. 946.

just as clearly as the other. There are two schools of thought with reference to the determination of the so-called "development cost" value. The first of these is a continuation of the cost or investment theory of value, and is based upon the actual losses sustained by the utility in the past, and its subsequent earnings as an offset to such losses. Under the cost method the going value of the enterprise is properly the difference between gross earnings and operating expenses plus depreciation and interest upon the investment.¹ In determining what expenditures listed as operating are to be included, the distinction as to what are revenue and what are depreciation and capital expenditures should be carefully maintained. A question of equal importance is whether expenditures have been wisely and necessarily incurred. The cost basis of estimating going value has been variously criticised by some, upon the ground that its estimates are too liberal, by others that it results in negative value and takes recognition of the utility's past financial history.² Its obvious merit lies in the fact that it assumes that the relations of users and utility have at all times been placed upon an equitable basis. The comparative plant method of estimating going value is a combination of the appraisal or cost of reproduction theory of value and is based upon the assumption that an identical utility property shall have been reproduced at the present time, and estimates the expenditures probably made before the hypothetical or comparative plant shall have been placed upon an earning basis identical with the present property.

§ 281. Capitalized rights.

The real truth is that in public service, where there is no right to earn more than a fair return upon capital invested, there is no scope for any intangible value rep-

¹ See *Public Service Gas Co. v. Public Utility Commissioners*, 84 N. J. L. 463, 87 Atl. 651. ² See *People ex rel. v. Willcox*, 210 N. Y. 479, 104 N. E. 911.

representing additional earning capacity. If a telephone company owns patents, its ownership of such intangible property is no more sacred than of its tangible property; it is subject to the rights of the public in this respect as in any other; and it must not charge against the public any value in the patent dependent upon the earnings which its monopoly of this device would give it. So of patent rights possessed by any utility; such rights may, undoubtedly, have values; but it would hardly seem that such values can properly be considered as permanent capital charges. Rights of this kind are, as a rule, secured because they are profitable or because, in one way or another, they tend to increase the net earnings. Likewise the exclusive contracts of the express companies with the railroads cannot be capitalized. Express rates cannot be based upon the monopoly right to be the exclusive forwarder over one or more railroads.³ And a contract which a local lighting company has with a hydroelectric plant to supply it with electricity upon very favorable terms, cannot be capitalized and a return demanded thereon.⁴

§ 282. Governmental valuations.

In the near future the Commission itself will ascertain the value of railroad properties and if the original cost of the railroads can be satisfactorily determined, and if this is the base of regulation which is thereupon adopted by the courts, it will be in shape to deal with the future on the basis of the past.⁵ The statute specifically provides that upon the completion of valuation the Commission shall thereafter in like manner keep itself informed of all extensions and other changes in the value of the properties of the railroads, and that it shall from time to time re-

³ In re Express Rates, 24 I. C. C. 380.

Conduit Co., 3 P. S. C. 2d Dist. N. Y. 656.

⁴ Fuhmann v. Cataract Power &

⁵ Detroit Switching Charges, 28 I. C. C. 494.

vise and correct its valuations. To enable the Commission to keep its valuation up to date as far as possible the railroads shall make such reports and furnish such information as the Commission may require. And yet one wonders whether this is an ultimate finality. Can the power be taken from the courts to determine by what facts and under what theories one shall be deprived of his all by governmental bodies? Perhaps by the time this question comes to the courts of last resort people will feel that we should not expect to hold any rights, however fundamental, save at the disposal of the commissions set over us to take us in charge. This is all largely an engineering problem of a higher sort, and should be solved upon business principles which are well accredited. Such authorities would well understand that current interest during the construction period (query whether this should not be a fair profit) is to be added to the capital charge.⁶

§ 283. Treatment of unearned increment.

Not only does it tend in the way described to demoralize public service to throw unmerited loss upon its proprietors, but it is even more obviously against the interests of the public to give the companies benefit of the unearned increment, due to the advance in value of property similarly circumstanced. Society is looking hungrily upon these values which it has itself given to private property, and where that property has a public character it is to-day barely holding itself in check. To one who is staking much upon the sanctity of property there is a threatening portent. Said the Commission in one of its most important opinions in late years,⁷ "This question is not of paramount importance in this case, but, it is urged, may become one of supreme moment if the carriers insist

⁶ See *Long Branch Commission v. Tintum Manor W. Co.*, 70 N. J. Eq. 71, 62 Atl. 474.

⁷ *Advance in Rates Cases of 1910*, 20 I. C. C. 243 *et seq.*

upon a right to increase rates in proportion to increasing land values. In a very real sense these added land values do not come to the railroad as a railroad, but as an investor in land which has been dedicated to a public use; and, being so dedicated, it may be strongly urged that the increment added thereto from year to year by communal growth should not necessitate an imposition of additional burdens upon the public." If the courts weaken in their protection of present values those unearned values will be the first to go. The companies will be fortunate then if they can save out of the total enough to recoup themselves for past deficit unearnings. The New York Commission, for example, holds that, while each case must be decided upon the facts peculiar to it, it is proper to take the land at its fair present value, and not at its original cost, and to treat the annual appreciation of the land as a profit of the company.⁸

§ 284. Valuation of utilized realty.

Strategic position as such can hardly be urged since the sharp language in the Minnesota Rate Cases.⁹ It used to be the fashion among railroad counsel to ask what it would cost another railroad to seize an existing terminal of the railroad with its superior position for serving the commercial community. It was claimed, that under the established rule of present value, whatever that cost would be, was protected by the Constitution in rates cases. It was said that this value of the site was to be determined by finding what the adjoining lands were now worth, and what demolition of buildings thereon. The right of way was valued by a corresponding contention at what an additional strip beside it would cost, having in mind that in condemnation proceedings there was usually a ratio of 3 to 1 as compared with other purchases. But the recent

⁸ See *Pioneer Tel. & Tel. Co. v. Westenhaver*, 29 Okla. 429, 118 Pac. 354.

⁹ *Simpson v. Shepard*, 230 U. S. 352, 57 L. ed. 1511, 33 Sup. Ct. 729.

decision of the Supreme Court has done away with this line of argument by saying that no arbitrary rules of this sort would be permitted, and that the theory of valuation underlying this was simply capitalizing the value of the business which the public was doing with the railroads on this site. A railroad exercises the right of eminent domain to secure its location, and the right of eminent domain can only be lawfully exercised for a public purpose. The location secured by this method for a public purpose cannot justly create a monopoly that will be capitalized against the very public purpose that it was intended to serve, the transportation of freight and passengers.¹⁰

Topic D. Cost of Reproduction

§ 285. Rule of the Minnesota courts.

According to the rule adopted in Minnesota the value on which a railroad is entitled to a fair return is the cost of reproducing the road in its present condition at present prices. If extraordinary expenses were necessary in establishing the road, or if higher prices prevailed at the time it was built, these should not enter into consideration at all; the rule of value laid down in the case of Milwaukee Electric Railway and Light Company v. Milwaukee¹¹ and generally elsewhere, is not followed. The leading case on this point in Minnesota is Steenerson v. Great Northern Railway,¹² where in delivering the principal opinion in the case Mr. Justice Cauty said: "The railroad may have been constructed years ago, when iron rails cost \$85 per ton, and everything else in proportion, or it may have been constructed yesterday, when steel rails cost but \$16 per ton, and everything else nearly in proportion. Counsel for the railway company dwell much upon the original cost of the older portions of these lines of road. If a railroad was built 30 years ago at a cost of

¹⁰ See *Missouri, K. & T. Ry. v. Love*, 177 Fed. 493.

¹¹ 87 Fed. 577.

¹² 69 Minn. 353, 72 N. W. 713.

\$40,000 per mile, and another one equally as good was built within a year through the same territory at a cost of \$12,000 per mile, on what principle should it be held that the old road is entitled to 3 1-3 times as much income as the new road? No guaranty was ever given by the State to the old road that the price of materials and the cost of construction would not decline, or that capital invested in railroads should not be subject to like vicissitudes as capital invested in other enterprises. Modern improvements and other causes have continued to reduce the cost of construction of all kinds of new plants, and to reduce the value of old plants, or render them wholly worthless, and the State did not guaranty that those causes should not in like manner affect the capital invested in railroads. Then the material question is not what the railroad cost originally, but what it would now cost to reproduce it."

§ 286. Methods of Texas commission.

This rule of replacement has been acted upon by other commissions than that of Minnesota, but not with the same success. In one of the opinions of the Interstate Commerce Commission this is said about the practice of the Texas commission:¹³ "The valuations of the Texas Commission of 1895 were by no means a guess. They were made in great detail, with great pains and with an honest attempt at accuracy. The purpose of the valuation was to determine not properly the value of a particular railroad but the cost of reproducing it at that time. Each mile was taken by itself and each item which enters into the cost of constructing a railroad by itself in actual quantities as shown by the profiles of the various roads. The allowances for the different items were liberal. Nothing was, however, allowed for the seasoning of the roadbed so to speak, nor for the franchise and good will of the railroad. The results arrived at did not perhaps express

¹³ Rates from St. Louis to Texas Points, 11 I. C. C. Rep. 264.

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the value of the properties, but they did express, and with substantial fairness and accuracy, the cost of reproducing those properties at the time of the valuation." ¹⁴

§ 287. The federal courts opposed.

The Minnesota rule having been applied by the Texas Railway Commission in fixing railroad rates in that State, the railroads filed in the federal court a bill for an injunction against the rates. The rule was held to be an improper and unreasonable one, and the exaction of the rates as fixed by the commission was restrained.¹⁵ Circuit Judge McCormick said: "It is therefore not only impracticable, but impossible to reproduce this road, in any just sense, or according to any fair definition of those terms. And a system of rates and charges that looks to a valuation fixed on so narrow a basis as that shown to have been adopted by the commission, and so fixed as to return only a fair profit upon that valuation, and which permits no account for betterments made necessary by the growth of trade, seems to me to come clearly within the provision of the Fourteenth Amendment to the Constitution of the United States, which forbids that a State shall deprive any person of property without due process of law, or deny any person within its jurisdiction the equal protection of the laws." ¹⁶

§ 288. Explanation of the California decisions.

Certain California decisions ¹⁷ appear to hold that nothing but the cost of reproduction is to be considered. The cases did not, however, go quite so far. They are well considered and explained by Circuit Judge Morrow in the federal court in the Ninth Circuit: ¹⁸ "Neither of these

¹⁴ See, however, *National W. W. Co. v. Kansas City*, 62 Fed. 853.

¹⁵ *Metropolitan Trust Co. v. Houston & T. C. R. R.*, 90 Fed. 683.

¹⁶ *Milwaukee Electric Ry. & L. Co. v. Milwaukee*, 87 Fed. 577, goes almost to the same extent.

¹⁷ *San Diego Water Co. v. San Diego*, 118 Cal. 556, 50 Pac. 633; *Redlands L. & C. D. Water Co. v. Redlands*, 121 Cal. 365, 53 Pac. 843.

¹⁸ *Spring Valley Waterworks v. San Francisco*, 124 Fed. 574.

cases goes to the extent of holding that in determining the value of the property of a corporation neither the capital stock nor bonded indebtedness can be considered. It is doubtless true that in many cases these elements may be excessive or fictitious, and represent speculative, rather than real and substantial, values. But there may be cases where both stock and bonds represent in the market a present actual value in the property of the corporation, and a value that could not be otherwise very well established. In such a case, what objection can there be to giving the evidence such consideration as, under all the circumstances, it deserves? It seems to me there can be none."

§ 289. Condition of the plant itself.

The essential inadequacy of the reproduction rule has often been remarked. The different factors that should be considered are well set forth in the case of the *National Waterworks Company v. Kansas City*,¹⁹ a suit brought by a water company to enforce the statutory obligation resting upon the city to pay to the company the "fair and equitable value" of the whole works. In answer to the theory that this would be satisfied by finding what the works could be reproduced for, Mr. Justice Brewer said that reproducing the waterworks plant would not be a fair test, because that did not take into account the value which flows from the established connections between the pipes and the buildings of the city. It is obvious that the mere cost of purchasing the land, constructing the buildings, putting in the machinery, and laying the pipes in the streets—in other words, the cost of reproduction—does not give the present value of the property. A completed system of waterworks, such as the company has, without a single connection between the pipes in the streets and the buildings of the city, would be a property of much less value than that system connected, as it is,

¹⁹ 62 Fed. 853, 10 C. C. A. 653.

with so many buildings, and earning, in consequence thereof, the money which it does earn. In the case of *Knoxville v. Knoxville Water Company*,²⁰ Mr. Justice Moody pointed out that in estimating for regulating purposes the value of a plant the cost of reproduction is not a fair measure of value unless a substantial allowance is made for the actual depreciation which makes an old plant of less value than a new one. And this he said in the particular case resulted in putting too high a valuation upon the waterworks. Its present physical value he thought was not more than the cost of reproduction less the actual depreciation.

§ 290. What physical reproduction means.

The Interstate Commerce Commission feels that if any importance whatever is to be attached to the cost of reproduction in the establishment of railway rates, the valuation must be undertaken by the Government itself.²¹ At the same time it should be said that the true value of a plant in operation as a going concern is actually more than the itemized specifications for the construction of the plant. Loss of return before the plant gets running, indeed, is by engineering estimates included in the original cost. At the same time it should be recognized that the physical adaptation of the plant for the business done, brought about by a long course of maintenance, should be taken into account, such as the solidification of the roadbed of a railroad by constant expenditure upon it. Recently, therefore, the cost of reproduction was considered in determining reasonableness of rate.²² It would seem that it should be conceded that in addition to the value of the tangible property some allowance is properly to be made for the cost of building up the business,

²⁰ 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. 148.

²¹ *City of Spokane v. N. P. Ry.*, 15 I. C. C. 376.

²² *Portland Chamber of Commerce v. O. R. R. & N. Co.*, 19 I. C. C. 265.

resulting from the losses sustained before the property has been placed upon a paying basis. Decisions of the State commissions have recognized the necessity of compensating for such early losses, and the existence of a going value upon this basis is becoming well recognized. It is the value of the enterprise that is in question, not the plant itself; it is a business which is being regulated, not a property.

§ 291. Identical reproduction.

There are a number of different conceptions of the cost of reproduction method.²³ Cost of reproduction may mean, either the cost at present prices of land, labor and materials under hypothetical conditions, or the cost at present prices of land, labor and materials of reproducing the existing plant under the actual conditions under which the existing plant was originally constructed. It is usual to say that the rule makes the cost of a substantially identical reproduction of the existing plant the standard. It does not mean, however, that obsolete facilities will be exactly duplicated, but that they will be assumed to be replaced by some modern substitute. On the other hand, cost of reproduction may mean the cost of a substitute plant of approved design, capable of performing the same service as the existing plant. The present value of the old plant is, by this standard, measured by the cost of an equally efficient new plant, less an allowance for the depreciated condition of the old plant. Upon the whole, it seems to be the most logical method of arriving at present structural value, if that is to be the test. But one difficulty in applying it arises from the fact that in many cases it is exceedingly difficult and expensive to determine on an equally efficient substitute plan.²⁴

²³ In *Capital City Gas Light Co. v. Des Moines*, 72 Fed. 829, it was said that valuation should be based upon

the estimated cost of an equally efficient plant.

²⁴ See also *Venner v. Urbana W. W. Co.*, 174 Fed. 348.

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§ 292. Intervening conditions.

Considered from all points of view the method of arriving at present value, by inquiring cost of reproduction of the existing plant under the actual physical and other conditions under which it was actually constructed, is perhaps fair to both parties in the majority of cases. It is a rule that corresponds to the actual equities of the parties, while the rule for reproduction, read as a whole at the present time, gives an unfair advantage in some cases to the public and in other cases to the company. Every legitimate expenditure in adapting the utility to the demands of progress and community growth is a proper charge to construction, and, as such, the investment therefore, is entitled to participate in the distribution of the earnings from operation.²⁵ Obviously expenditures by a traction system for payment incurred by the utility in response to assessments levied therefor by the city, or the cost of cutting through a pavement for construction purposes and its replacement, are proper capital charges. It does not necessarily follow that the utility is to capitalize expenses for municipal betterment in which it has not participated, such as pavements laid later, where such accruing benefits to the utility are remote.²⁶

§ 293. Piece-meal construction.

Whether an allowance for piece-meal construction should be made is more an engineering question than a legal problem. It has seemed to some tribunals that the fact the plant has been constructed piece-meal does not increase its present value, although the cost of construction by such method may have been greater than if it had been constructed at one time.²⁷ On the other hand, as construction goes it is never let under one contract and done at

²⁵ See *Des Moines W. W. Co. v. Des Moines*, 192 Fed. 193.

²⁶ But see *Cedar Rapids W. Co.*

v. Cedar Rapids, 118 Iowa, 234, 91 N. W. 1081.

²⁷ See *St. Louis Public Service Commission* (1911), p. 54.

one time. The course followed in the constructing of the existing plant would be the better test. Here again if the actual course has been unreasonable, one which could not have been considered good management at the time, it should not be taken as a standard. But if the construction has been well advised, it would seem to be better to follow the actual course rather than a hypothetical one. At the same time it should be appreciated that the question for the experts where the reproduction test is involved is what proper construction of the plant in question would cost.²⁸

§ 294. Overhead charges.

Apart from the expense of labor and material incurred in constructing the plant, many additional costs must be met which do not appear in the appraiser's inventory of tangible property. Among these are the expenses of organization preliminary to the construction of the property, usually consisting of engineering and legal expenses; the expenses of supervising, including the wages of all contractors, superintendence and necessary administrative organization; contingent costs due to loss in time and material; and unexpected obstacles occurring during the progress of construction; and, finally, the expense of financing the construction, consisting principally of interest on money advanced prior to operation.²⁹ Allowances for such expenditures are usually made in appraisals of public utility properties. The amount for such a percentage allowance has frequently been made a matter of dispute and is still a controverted point. Two methods of computing overhead charges are in use: (1) a scheduling of the items of the overhead; (2) a percentage allowance to be added to structural value.³⁰

²⁸ See Palo Alto Case before the No. 2, P. S. C. N. Y. 1st Dist. (1911).
Calif. R. R. Comm. (1913).

²⁹ See for the itemized system, Wis. R. R. Com. Rep., vol. V, p. 13.
³⁰ See for the percentage system,

§ 295. Unit prices.

If it is desired to base fair value on the reproduction method in its strictest form, present prices are doubtless the more logical. If the problem is, what will it cost to-day to replace the existing plant, the prices of to-day will naturally be used. The theory that an average for a period of years preceding equal to the assumed construction period shall be used has its difficulties.³¹ Moreover, price movements are quite frequently in long cycles and therefore present prices may be nearer the average based on the past few years. On the other hand, it is clear that a process of averaging by five or ten year periods greatly reduces the fluctuation in price level. A curve showing monthly prices averaged annually is uneven, while with each lengthening of the period to two years, five years, the curve is smoothed out and the variations from year to year correspondingly reduced. If the reproduction method is used, not as an end in itself but as a means of finding a fair and equitable basis for determining the relations between the investor and the consumer, a modification reducing the effect of price fluctuations is not inconsistent.³²

§ 296. Cost of building up the business.

The cost of building up the business must be taken into consideration, in determining the value of the plants for rate fixing purposes. Both justice and authority require that a proper allowance should be made for this element in placing a value on the property of public service corporations. The investor in public service properties should receive a return on his investment for the entire period during which it is devoted to the public service, and a return not only on the first investment, but on the amount necessarily spent in putting the business on a paying basis, including profits foregone during the early years.

³¹ See N. H. P. S. Com., 1912, p. 139.

³² See Conn. P. U. Com., 1912, p. xxvi.

But there is no reason for including in a valuation under the name of going value, the cost of securing all the business connected with the property appraised. That the allowance for going value should be sufficient to cover the cost of bringing the property to the point where a fair return upon the prior investment can be secured. What should be taken is the average time for the completion of each operating unit, due allowance being made for the cost of such unit. A pure average is not correct, for the amount of interest to be paid has relation, not merely to the period, but to the cost of the work.

CHAPTER VII

RATE OF RETURN

- § 300. Provisions of the Act.
- 301. Elements in determining a fair return.

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§ 300. Provisions of the Act.

The question of rate of return has been subjected to the jurisdiction of the Commission only to the extent of giving it oversight over payments of this sort. Such payments to owners of securities must be duly reported; and the requirements of the Commission in regard to accounting are such that the result will be that dividends will only be showed as having been earned, after allowances for depreciation and betterments, such as the Commission requires, shall be met. In section 20 it is provided that the annual reports, which carriers subject to the Act shall file with the Commission, shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; and the cost and value of the carrier's property, franchises, and equipments. Later in the section it is provided that the Commission may, in its discretion, prescribe the forms of any and all accounts to be kept by carriers subject to the provisions of the Act. The exercise of the powers of the Commission under these provisions of the Act are also discussed in Chapter XX, particularly in Topic A.

§ 301. Elements in determining a fair return.

What constitutes a fair rate of return may not be fixed by general rule, but is largely a question of the particular case. It depends to a certain extent upon the character of the enterprise; in established businesses, a lower rate

should be expected than in new ventures. Again, it depends upon the nature of the security; upon bonds, a lower rate of interest is secured than the percentage payable in dividends upon stocks. These are the principal considerations; but as the discussion advances it will be seen that there are other minor matters to be taken into account. It will make some difference, also, in what manner the matter comes before the court for decision. If the question is whether a rate fixed by one in a public service is producing an unreasonably high rate of return, that is one thing. If the question is whether a rate fixed by public authority, either by the legislature directly or by a commission acting in pursuance of legislative authority, is unreasonably low, that is another matter. It is obvious that there is all the difference of reasonable alternatives between these two aspects of the problem, that eight per cent might not be too much return by a schedule fixed by the company in one case, while a reduction of a schedule by legislation so as not to produce more than six per cent might not be thought outrageous in the other.

Topic A. Establishment of the Doctrine

§ 302. Establishment of the power to restrict charges.

The earlier cases under the Fourteenth Amendment simply established that the State might regulate the rates of those engaged in public employment. The attention of the court was directed to showing that the power to regulate existed, and practically nothing was said about the limitations upon that power. And, indeed, the complainants did not adduce evidence that the rates fixed by the State were inadequate; they denied altogether that the rates could be regulated at all. The idea of these earlier cases, so far as one can judge from the language used, was that regulation of rates might go to any extent, so long as a deficit was not brought about.³³ In the much-

³³ The federal cases of this period, net profit left, apparently no matter which held that if there was any how small, the legislation was not

quoted case of *Chicago and Northwestern Railroad v. Dey*,³⁴ Mr. Justice Brewer, then in the Circuit Court, said: "The rule, therefore, to be laid down is this: That where the proposed rates will give some compensation, however small, to the owners of the railroad property the courts have no power to interfere. Appeal must then be made to the legislature and the people. But where the rates prescribed will not pay some compensation to the owners, then it is the duty of the courts to interfere and protect the companies from such rates."

§ 303. Rates fixed must not produce a deficit.

As soon as the power to regulate was once established, the point was urged that the power had its limitations, and this the court conceded in very guarded language. For example, in the *Railroad Commission Cases*,³⁵ Chief Justice Waite said: "From what has thus been said it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation." As late as the case of *Reagan v. Farmers' Loan & Trust Company*³⁶ this requisite was not stated unequivocally. In that case Mr. Justice Brewer said: "It is unnecessary to decide, and we do not wish to be understood as laying down an absolute rule that in every case a failure to produce some profit to those who have invested their money in the building of a road is conclusive that the tariff is unjust and unreasonable. And yet justice demands that every one should receive some compensation for the use of his money and property, if it be possible without prejudice to the rights of others."³⁷

confiscatory, were: *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 72; *Peik v. Chicago & N. W. Ry. Co.*, 94 U. S. 164, 24 L. ed. 97; *Chicago, B. & Q. Ry. Co. v. Iowa*, 94 U. S. 155, 24 L. ed. 94; *Chicago, M. & St. P. R. R. Co. v. Ackley*, 94 U. S. 179, 24 L. ed. 99; *Tilley v. Savannah,*

F. & W. R. R. Co., 5 Fed. 641; *Wells v. Oregon Ry. & Nav. Co.*, 15 Fed. 561.

³⁴ 35 Fed. 866, 1 L. R. A. 744.

³⁵ 116 U. S. 307, 29 L. ed. 636.

³⁶ 154 U. S. 362, 38 L. ed. 1014, 14 Sup. Ct. 180.

³⁷ The Federal cases of this transi-

§ 304. Adequate return must be left.

But in 1898, in the important case of *Smyth v. Ames*,³⁸ a disposition was shown to give more protection to the owners of the railroads. It was proved in that case that the regulation complained of might, very probably, leave some return above all proper charges. But this did not satisfy the court, Mr. Justice Harlan saying: "What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth." Ever since this case the doctrine has been well established that except in abnormal cases legislation reducing rates which does not leave a fair profit upon the capital involved is virtually confiscatory. It should be noted, as was pointed out not long ago in *Missouri, Kansas & Texas Railway v. Interstate Commerce Commission* ³⁹ that these limitations apply to the Interstate Com-

mission period when it was hoped that a profit would normally be left the public service company whose rates had been reduced by legislation were: *Dow v. Beidelman*, 125 U. S. 680, 31 L. ed. 841, 8 Sup. Ct. 1028; *Chicago & G. T. Ry. v. Wellman*, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. 400; *Chicago N. W. R. R. v. Dey*, 35 Fed. 866, 1 L. R. A. 744; *Chicago & P. M. & O. R. R. Co. v. Becker*, 35 Fed. 883.

³⁸ 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. 418. See also *St. Louis & San Francisco Ry. Co. v. Gill*, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. 484.

In the following federal cases, among others, the new rates imposed by governmental authority were held confiscatory by the above principles on the showing made by the evidence adduced. *Cotting v. Kansas*

City S. Y. Co., 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. 30; *Southern Pac. Ry. Co. v. Railroad Commission*, 78 Fed. 236; *Northern Pac. Ry. Co. v. Keyes*, 91 Fed. 47; *Milwaukee Electric Ry. Co. v. Milwaukee*, 87 Fed. 577; *Ozark Bell Telephone Co. v. Springfield*, 140 Fed. 666; *Southern R. R. Co. v. M'Neill*, 155 Fed. 756; *Seaboard Air Line Ry. Co. v. Railroad Comm.*, 155 Fed. 792.

³⁹ 164 Fed. 645. See *Hooker v. Interstate Commerce Commission*, 188 Fed. 484.

See the recent United States Supreme Court cases in which the propriety of the action of the Commission under its recent powers to fix rates has been brought in question such as: *Interstate Commerce Commission v. Stickney*, 215 U. S. 98, 30 Sup. Ct. 66; *Interstate Commerce Commission v. Union P. Ry.*, 222

mission by virtue of the protection of property from invasion by the United States under the Fifth Amendment, just as much as these principles hold the hands of the State commissions by virtue of the Fourteenth Amendment.

§ 305. Reasonable return must be left.

The present doctrine of the United States Supreme Court, as seen in *Stanislaus County v. San Joaquin Canal and Irrigation Company*,⁴⁰ is that rates of a public service company may be reduced any amount provided that a reasonable return is left to the owners upon the value of the property devoted to the public use. In that case an ordinance adopted by a board of supervisors fixing water rates was objected to because the results would work a reduction of its rates from eighteen to six per cent. The reply of Mr. Justice Peckham, in the Supreme Court of the United States, to this contention was: "It is not confiscation, nor a taking of property without due process of law, nor a denial of the equal protection of the laws, to fix water rates so as to give an income of six per cent upon the then value of the property actually used for the purpose of supplying water as provided by law, even though the company had prior thereto been allowed to fix rates that would secure to it one and one-half per cent a month income upon the capital actually invested in the undertaking. If not hampered by an unalterable contract, providing that a certain compensation should always be received, we think that a law which reduces the compensation theretofore allowed to six per cent upon the present value of the property used for the public is not unconstitutional. There is nothing in the nature of con-

U. S. 541, 56 L. ed. 308, 31 Sup. Ct. 106; and also the latest cases in that court on appeal, pointing out that for the authorities of a State to attempt to require a carrier to serve for a rate less than what is truly reasonable is virtually confiscation:

Missouri Pacific Ry. v. Tucker, 230 U. S. 340, 57 L. ed. 1507, 33 Sup. Ct. 962; *Louisville & N. Ry. v. Garrett*, 231 U. S. 298, 57 L. ed. 1597, 33 Sup. Ct. 985.

* 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. 241.

fiscation about it.”⁴¹ It should be noted that the State courts are limited by guarantees of similar tenor in their own constitutions, as well as by the Fourteenth Amendment to the Federal Constitution. One way or another, therefore, precedents as to the meaning of confiscation are significant generally in this connection.⁴²

§ 306. Reasonableness of return a judicial question.

In a comparatively recent case, this elementary rule is stated in most emphatic language. It appeared in the case of *Palatka Waterworks v. Palatka*⁴³ that an ordinance of the city had reduced rates fifty per cent, and against the enforcement of these new rates an injunction was asked. In granting this Judge Shelby said: “Conceding the legislative right to regulate the charges to be made by the complainant for water, such regulation must be within reasonable limits. It could not lawfully go to the extent of depriving the complainant of all income from its investment, and in effect confiscate its property. The power to regulate could not legally be used as the power to destroy. The question of the reasonableness of such regulations is one for judicial examination and determination. But the judiciary ought not to interfere with rates established under legislative sanction, where the legislature has the right to act, unless they are plainly and palpably so unreasonable as to make their enforce-

⁴¹ To the same effect is *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. 48.

⁴² In the following cases, among others, in the State courts the extent of these constitutional limitations was discussed generally: *Spring Valley Waterworks v. San Francisco*, 82 Cal. 286, 22 Pac. 910; *Chicago v. Rogers Pk. Co.*, 214 Ill. 212, 73 N. E. 375; *Maryland Tel. Co. v. Simons Sons Co.*, 103 Md. 137, 63 Atl. 314; *Pennsylvania R. R. Co. v. Phila-*

delphia County, 220 Pa. St. 100, 68 Atl. 676, 15 L. R. A. (N. S.) 108; *State v. Central Vt. Ry. Co.*, 81 Vt. 463, 71 Atl. 194, 130 Am. St. Rep. 1065.

⁴³ 127 Fed. 161. Citing *Covington Road Co. v. Sandford*, 164 U. S. 578, 17 Sup. Ct. 198, 41 L. ed. 560; *San Diego Land Co. v. National City*, 174 U. S. 739, 19 Sup. Ct. 804, 43 L. ed. 1154.

See also *Farmers' Loan & T. Co. v. No. Pacific Ry.*, 83 Fed. 249; *Ball v. Rutland R. R.*, 93 Fed. 513.

ment equivalent to depriving the complainant of reasonable returns on its investment; but judicial interference is proper when the case shows an attack upon the rights of property, under the guise of regulating, which will make the plaintiff's property valueless in his hands." Since reasonableness of return is a judicial question, any attempt to prevent access to the courts to test the validity of rates established by the authorities by imposing severe penalties as in *Ex parte Young* " makes the scheme of regulation void, unless provision is made for trying out the issue in some way.

§ 307. Reasonable profit upon each transaction.

It will be assumed throughout this discussion that all that the law secures to those who devote their capital to public business is the enjoyment of total receipts from that business, be it large or small, sufficient to show a fair per cent of profit upon that capital each year. This undoubtedly is the general rule with which the courts have been working. However, there are some decisions as to certain businesses, which must be reckoned with, that suggest a different basis. According to these dicta, in certain businesses, at least, the proprietors are entitled to a fair percentage of profit upon each service it renders, regardless of the total return this in the aggregate may show upon the capital that is employed. In deciding against legislation reducing the charges of a stock yard the Supreme Court " said: "The question is not how much he makes out of his volume of business, but whether in each

" 209 U. S. 123, 52 L. ed. 714, 28 Sup. Ct. 441. See also *Missouri Pacific Ry. v. Tucker*, 230 U. S. 340, 57 L. ed. 1507, 33 Sup. Ct. 961.

If, however, the statute imposing the penalty may be construed so as not to be applicable to one testing its validity in good faith the difficulty is obviated. *Chesapeake & O. Ry. v. Conley*, 230 U. S. 513, 57 L. ed. 1597,

33 Sup. Ct. 985. See also *Louisville & N. v. Garrett*, 231 U. S. 298, 34 Sup. Ct. 48, when the provisions were held to be separable.

" *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. 30.

Citing *Canada So. R. R. Co. v. International Bridge Co.*, L. R. 8 App. Cas. 723.

particular transaction the charge is an unreasonable transaction for the service rendered." What the Privy Council had previously said in regard to bridge tolls was approved. "The principle must be, when reasonableness comes in question, not what profit it may be reasonable for a company to make, but what it is reasonable to charge to the person who is charged." These dicta as will be seen when the cases are examined more closely by one, are by the context confined to that small class of public services which receive no public aid either by way of grant or of privilege; thus confined it should not affect the general law.⁴⁶ But, certainly, were it to be held a proper principle for all cases, it would subvert the whole basis of the established law. Those businesses in which there are naturally but few transactions comparatively, would be ruined, while those in which a great number of transactions are carried on would profit enormously.

§ 308. Jurisdiction of the Commission.

It should be noted that the Commission has disclaimed jurisdiction to deal with the question of the rate of return, which the carriers are getting, as such. It declared in the Rate Advance cases of 1910 that it had no authority to say that a railroad ought to earn, either as a matter of right or as a matter of public policy, any given per cent upon its value; but, in discharging its duty to say whether the particular rates which the carriers propose to establish, are just and reasonable, it must determine in a general way what a fair return would be.⁴⁷ It has, until recently, taken the attitude that, strictly speaking, it has no jurisdiction to say defendants are justified in advancing rates for purpose of obtaining greater net rev-

⁴⁶ It was held in one proceeding that 10% of gross express earnings in the express business being profit is liberal, because the capital involved is so small. *Kendel v. Adams Express Co.*, 13 I. C. C. 475.

See also to the same effect, *In re Express Rates*, 24 I. C. C. 380.

⁴⁷ *In re Advance in Rates—Eastern Case*, 20 I. C. C. 243.

enues; but in the Five Per Cent Rate cases of 1914 this policy has apparently been abandoned by the majority of the Commission, to judge from the language of the minority.⁴⁸ The fact that net earnings may be large does not of itself justify the Commission in fixing rates less than are reasonable for service; likewise whether the Commission has power to reduce rates for sole reason that revenues are excessive is not decided.⁴⁹ At the same time, in reducing rates, the Commission feels bound to consider whether a contemplated readjustment of rates will result in undue impairment of the revenues of the railroad.⁵⁰ And it will be much swayed by the contention, if supported by the evidence, that a decrease in rates would be ruinous to the business of the protestants.

§ 309. Status of the companies affected.

Unreasonable rates cannot be permitted simply because the entire result of company's operations might not be as favorable as would otherwise be proper.⁵¹ The mere fact that the road in question is being operated at a loss, does not justify rates unreasonably high for service performed.⁵² It follows that the unfavorable financial condition of the defendant railroad cannot lawfully be remedied by imposing unreasonable rates.⁵³ The Commission has taken the attitude that an increase made solely for the purpose of obtaining more revenue cannot be justified.⁵⁴ And it has said that the capitalization of a corporation is not a measure of the reasonableness of its rates.⁵⁵ And in one opinion, at least, the Commission went so far as

⁴⁸ The Five Per Cent Cases. Opinions of Dec. 18, 1914.

⁴⁹ Railroad Commissioners of Iowa v. I. C. C. R. Co., 20 I. C. C. 181. See also city of Spokane v. N. P. Ry., 19 I. C. C. 162.

⁵⁰ Black Mountain C. L. Co. v. Southern Ry., 15 I. C. C. 286.

⁵¹ In re Express Rates, 24 I. C. C. 380.

⁵² In re Advance on Coal to Lake Ports, 22 I. C. C. R. 604.

⁵³ Hitchman Coal & Coke Co. v. B. & O. R. R. Co., 16 I. C. C. 512.

⁵⁴ Demer Son & Co. v. A. T. & N. R. R., 19 I. C. C. 575.

⁵⁵ Commercial Club of Salt Lake City v. A., T. & S. F. Ry., 19 I. C. C. 218.

to say that a definite and uniform allotment of funds from the charge imposed for the movement of each character of traffic, to provide for interest, dividends and surplus is not proper.⁵⁶ Of course, the fact that all concerned have been prosperous, although a matter to be considered, does not conclusively show that rates are not right.⁵⁷ But during the time it is being operated without assurance of profit, a new line would not be required to establish as low a rate as a more firmly established road.⁵⁸

Topic B. Fair Rate of Return

§ 310. Interest upon bonds protected.

It was generally agreed from the very first that, whatever might be the right to earn a dividend upon stock, the interest upon the outstanding bonds must be protected. Thus in *Chicago and Northwestern Railway v. Dey*,⁵⁹ Mr. Justice Brewer was apparently ready to protect the interest upon outstanding bonds in all contingencies, although he left the question of whether any surplus should be left for dividends to the discretion of the legislature. But, certainly, as the United States Supreme Court said some years later, bond issues which have no actual values behind them have no protection.⁶⁰ And if the interest in the bonds is fixed unduly high at the outset, it will not be protected against legislation reducing rates, as the California courts hold.⁶¹ Indeed, it has been questioned whether more than the current rate of interest upon borrowings, in an enterprise of similar character, can be secured to bondholders. In the case of *Steenerson*

⁵⁶ *Railroad Commissioners of Iowa v. I. C. R. R.*, 20 I. C. C. 181.

⁵⁷ *Railroad Commissioners of Florida v. S. A. L. Ry.*, 16 I. C. C. 1.

⁵⁸ *Collingwood Brick Co. v. P. M. R. R.*, 26 I. C. C. 572.

⁵⁹ 35 Fed. 866. See also *Brymer v. Butler Water Co.*, 179 Pa. St. 231, 36 Atl. 249, 36 L. R. A. 260.

⁶⁰ *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. 418. See also: *Spring Valley Waterworks v. San Francisco*, 124 Fed. 574.

⁶¹ *Spring Valley Waterworks v. San Francisco*, 124 Fed. 574. And compare *Redlands L. & C. D. Water Co. v. Redlands*, 121 Cal. 365, 53 Pac. 843.

v. Great Northern Railway Company,⁶² the court answered the question in the negative, Mr. Justice Canty saying: "If a railway company has made what turns out to be a bad bargain by issuing its bonds for six per cent or seven per cent interest per annum that should be its misfortune and not the misfortune of the public." ⁶³

§ 311. Rates at which governments can borrow no criterion.

The Commission has been accustomed to repeat with approval the language of the courts to the effect that compensation implies payment of cost of service, interest on bonds, and then some dividend. The rates at which governmental bodies can borrow is obviously no criterion in itself. The standard is what the current rate of return is on securities of private companies conducting other businesses of similar character. This has been pointed out by the Commission, very clearly:⁶⁴ "In many countries the conduct of transportation by railways is undertaken by the government at public expense. The government of the United States could probably borrow what money would be needed to buy or build the railways of this country at from 2 1-2 to 3 per cent. Ought the public to be taxed for the service rendered beyond this rate of interest? Plainly, no such test ought to be applied. This government does not undertake that duty, nor does it guarantee any rate of return upon the money invested. It would be clearly unjust to impose upon the private capital which performs this quasi-government function all the hazard without allowing it some participation in whatever profit may accrue." ⁶⁵

⁶² 69 Minn. 353, 72 N. W. 713. Co. v. City of Norwich, 76 Conn. 565, 57 Atl. 746.
But see Pennsylvania R. R. Co. v. Philadelphia County, 220 Pa. St. 100, 68 Atl. 676, 15 L. R. A. (N. S.) 108. ⁶⁴ Morgan Grain Co. v. A. C. L. R. R., 19 I. C. C. 460.

⁶⁵ See contra, Norwich Gas & E. I. C. C. Rep. 382. ⁶⁶ Re Advance Freight Rates, 9

§ 312. Prevailing rate of interest allowed.

The prevailing rate of interest upon bonds of like security is to be allowed to bondholders; and the court will inform itself as to that. Thus when the point was raised in *Milwaukee Electric Railway Company v. Milwaukee*⁶⁶ Judge Seaman in protecting the bondholders and others against undue reduction of fares by city ordinance, said: "The interest rate fixed in the bonds issued by the company is 5 per cent. The rate which prevails in this market, as shown by the uncontroverted testimony, is 6 per cent for real estate mortgages and like securities. If the \$5,000,000 basis be adopted, surely a better rate must be afforded for the risks of investment than can be obtained on securities of this class, in which there is no risk. Upon the basis of \$7,000,000, which is more logical and just, the 5 per cent named in the bonds is clearly not excessive, and should be accepted by a court of equity as the minimum of allowance; and, even upon the defendant's partial showing, the return would be less than one-quarter per cent above that, with the large margin for depreciation left out of account."⁶⁷

§ 313. What are reasonable dividends?

Within the last ten years, as has been seen, the general principle has become established that there must be left to those who conduct a public enterprise an adequate return on their investment as a whole. This newer view was well put in one sentence in *New Memphis Gas Light Company v. New Memphis*,⁶⁸ thus: "The company has a right to such gross revenue from the sale of gas as will enable it to pay all legitimate operating expenses, pay interest on valid fixed charges, so far as bonds or securities represent an expenditure actually made in good faith, and also to pay a reasonable dividend on stock, so far as this

⁶⁶ 87 Fed. 577.

⁶⁷ The prevailing rate of interest is the test; see *Stanislaus Co. v. San*

Joaquin C. & I. Co., 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. 241.

⁶⁸ 72 Fed. 952.

represents an actual investment in the enterprise." What then is reasonable dividend? Dividends upon stock at least where there are outstanding bonds ought to be permitted to be somewhat larger than the interest upon the bonds. Since the bonds have a prior lien upon the assets, the risk to the holders of them is much less than to the holders of stock, and the stockholders should therefore have a higher rate of return because of the risk of passing of dividends in bad times or of foreclosure in case of complete failure. This question of reasonable dividend depends chiefly upon the current rate of return.⁶⁹

§ 314. Current rate of return.

What constitutes a fair rate of return must obviously be determined by some standard. The current rate of return upon enterprises of a similar character is submitted to be the true basis of fixing the percentage. This is the basis insisted upon in testing the evidence in the more discriminating cases which discuss the problem carefully. Thus in *Spring Valley Waterworks v. San Francisco*,⁷⁰ where an ordinance passed by a board of supervisors would reduce the annual net earnings below 4.40 per cent on the value of the property necessarily employed in the service, or 3.30 per cent on its stock after deducting proper charges, its enforcement was enjoined as fixing a rate so low as to be a taking of private property for public use without just compensation, Judge Merrow said: "The next question to be considered is, what will be a fair and reasonable income for the complainant to receive as a just compensation for the public use of its property? A number of bankers have testified as to the usual and customary net income from investments of \$10,000,000 and upwards of capital in corporations of a quasi-public nature, where judiciously managed. The affidavits of four bankers of

⁶⁹ Among the many cases to this effect, see *Pennsylvania R. R. Co. v. Philadelphia County*, 220 Pa. St. 100, 68 Atl. 676, 15 L. R. A. (N. S.) 108.

⁷⁰ 124 Fed. 574.

long experience and well-known character and standing fix the rate at not less than 7 per cent per annum, and aver that a net income of less than 7 per cent per annum from large investments would not be a reasonable or fair return. The affidavits of five bankers of like standing and character and similar experience fix the rate at not less than 6 per cent per annum, and aver that a net income of less than 6 per cent per annum for large investments would not be a reasonable or fair return. The affidavit of one banker of large wealth and experience fixes the rate of net income from such investments at between 4 and 5 per cent per annum. The weight of evidence is clearly in favor of a rate of not less than 6 per cent per annum."⁷¹

§ 315. Fair rate of return.

According to present ideas, therefore, a fair rate of return must be left in the generality of cases; but if an adequate return is left, the legislation is of course constitutional, although it be a reduction from the rates formerly in force. In *Cedar Rapids Company v. Cedar Rapids*⁷² Mr. Justice Weaver in dismissing a complaint, to the effect that a reduction in rates of a water company made by public authority was unconstitutional because confiscatory, said: "Just the extent which this reduction will affect the company's earnings it is impossible to prove or predict with certainty, but we see no reason to believe that the total revenue, after making all due allowance for discounts, will be reduced below \$50,000. The operating expenses charged for the year preceding the trial (being largely in excess of the average in its experience) were \$23,000, or, including taxes, \$28,000. On this basis the net earnings are 5 1-2 per cent on a valuation of \$400,000, or 4 2-5 per cent on a valuation of \$500,000, or 6 1-2 per cent on the total amount of capital

⁷¹ Of the cases cited, see especially *U. S. 439, 47 L. ed. 892, 23 Sup. Ct. San Diego L. & T. Co. v. Jasper*, 189 571.

⁷² 118 Iowa, 234, 91 N. W. 1081.

stock and bonds. Stated otherwise, this will enable the company to pay its interest charge of \$7,500, make a dividend of 5 per cent on its capital stock (including stock issued as dividends), and leave a margin of over \$3,000 for contingencies. This estimate of earnings may be very materially reduced, or the estimate of the value of the plant be very materially increased, before the court will be justified in saying that the plaintiff's property is being exposed to destruction or confiscation by an unprofitable schedule of rates." ⁷³

§ 316. Current rate the standard.

It will be seen, therefore, that the current rate of return to capital is accepted as the true basis of fixing the percentage. Some illustrations of the way the courts treat the matter nowadays will illustrate this further. In *Brymer v. Butler Water Company* ⁷⁴ the court said in reviewing the schedule of a water company, that it is entitled to a rate of return, if the property will earn it, not less than the legal rate of interest; a return of something over six per cent was held not unreasonable therefore. Furthermore this court, in the still later case of the *Pennsylvania Railroad Company v. Philadelphia County*, ⁷⁵ frankly said that it regarded its previous suggestion of six per cent as simply fixing a minimum return, not the maximum one at all. Men do not put their money into business enterprises for small interest, as this court well says. In a recent federal case ⁷⁶ the court thought that the owners of a railroad should have a profit above the necessary expense of conducting such business equal to eight per cent per annum upon the value of the property so employed, that being the legal rate of interest in Alabama on loans of money, and the current rate of profit

⁷³ See accord *Brymer v. Butler Water Co.*, 179 Pa. St. 231, 36 Atl. 249, 36 L. R. A. 260.

⁷⁴ 179 Pa. St. 231, 36 Atl. 249.

⁷⁵ 220 Pa. St. 100, 68 Atl. 676, 15 L. R. A. (N. S.) 108.

⁷⁶ *Central R. Co. v. Railroad Commission*, 161 Fed. 925.

upon property used in business enterprises similar to railroads. And upon the same general principle, another federal judge held recently that a local Louisiana telephone company which was making seven per cent ought not to be disturbed.⁷⁷ With these cases in mind, one is justified in saying that the current rate of return to capital invested⁷⁸ in the community served may confidently be expected.⁷⁹

§ 317. Reasonable profits sufficiently safe.

In any normal case, the proprietor of a public service may therefore expect a dividend equal to the current rate of return in enterprises of similar character. It should be borne in mind, however, that public services have in general more assured permanence, and less danger of ruinous competition, than most private businesses. However, opinions must necessarily differ as to what would be a reasonable profit in a given case. Most courts, when asked to declare the action of some legislative body in reducing certain rates to be virtual confiscation, will take the attitude that, unless the reduction worked is really indefensible, the legislative rate will not be disturbed.⁸⁰ Thus in a recent Iowa case⁸¹ the court did not consider an ordinance confiscatory which so reduced rates as to leave the company about five per cent on the value of the property which resulted in this case in over six per cent on its outstanding securities. A recent Florida case,⁸² where it was held that the court could not say that even three and one-half per cent upon the cost of a system was confiscatory, is to be explained by the fact that the present value might be one-half of the actual cost. Generally

⁷⁷ *Cumberland Tel. & Tel. Co. v. R. R. Commission*, 156 Fed. 823. 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. 192.

⁷⁸ *Missouri R. & R. T. Co. v. Love*, 177 Fed. 493. ⁸¹ *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Iowa, 234, 91 N. W. 1081.

⁷⁹ *Louisville & N. Ry. Co. v. Brown*, 123 Fed. 946. ⁸² *State ex rel. v. Seaboard A. L. R. R. Co.*, 48 Fla. 129, 37 So. 314.

⁸⁰ *Willcox v. Consolidated Gas Co.*,

speaking proof that the net earnings which will be left by the proposed reduction will leave an absurdly low percentage, as in one recent case⁸³ two and one-third per cent, is enough to condemn the legislative rate. In one of the latest federal cases⁸⁴ it is said succinctly that the authorities practically establish a six per cent minimum. This is based upon the doctrine in *Cotting v. Kansas City Stock Yards Company*;⁸⁵ the court said in effect that legislation cutting the return of the company below six per cent was unconstitutional. Confined by the courts to this extent, regulation by commissions should have no terror to the investor. Bonds and stocks thus protected will not be brought below par by governmental action; indeed, they will in certain instances still sell at a premium.

§ 318. Rate of return upon investments in general.

Whatever standards there are in this matter are plainly external, and the court will take into account the rate of return upon investments prevailing in business generally. In a later opinion⁸⁶ the Commissions laid down this policy, "It may be admitted that it is for the interest of the general public, as well as the railroads, that their funded debt should bear as low a rate of interest as possible. A very considerable part of the saving to railway companies in recent years has come from a reduction in the rate of interest paid. In 1895 the average rate paid by all the railroads of this country was 4.69 per cent; in 1909 this figure had been reduced to 3.90 per cent, and the saving computed upon the indebtedness of 1909 represented by this decrease in the rate of interest would have amounted to \$77,000,000. Interest upon its funded debt is a fixed charge in the nature of an operating expense, and, in proportion as this charge can be reduced, benefit should

⁸³ *Coal & Coke Co. v. Conley*, 67 W. Va. 129, 67 S. E. 613.

⁸⁴ *St. Louis & S. F. Ry. v. Hadley*, 168 Fed. 317.

⁸⁵ 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. 30.

⁸⁶ *Advance in Rates*,—*Eastern Case*, 20 I. C. C. 243, *passim*.

accrue both to the railway company and its patrons. It must be conceded, therefore, that railway rates and the treatment of our railways should be such as will make the long-time railway bond, which bears a proper relation to the value of the security, a favorite with the investing public."⁸⁷

§ 319. Public service has its peculiar risks.

Just what rate of interest a public service company should be allowed to pay upon its securities is difficult to determine by rule, since the circumstances will be different in different cases. Whatever it is obliged to pay to sell its bonds at par, if the negotiations for the issue are conducted with good faith, would be the test. And that would depend upon the stability of the business to the mind of the lenders. Public service bonds are sold on the exchanges from as low as a three per cent basis to as high as a sixteen per cent basis, and doubtless will always continue to do so. Enterprise and industrial progress would be at a standstill if the rate was kept down to that on government bonds.⁸⁸ It must be remembered that those who embark in public services place their property to a great extent in the hands of the public. They must be always ready to supply the public demand, and must take the risk of any falling off in demand. They cannot convert their property to any other use, however unprofitable the public use may have become.⁸⁹ They must run in good times and bad with substantially the same expense. If they lose in bad times, they cannot recoup themselves by extraordinary profits

⁸⁷ Where particular rates on a particular commodity between particular points are challenged, the question of net earnings on the particular lines involved is not important, unless it be shown that the margin of profit is so small on the system's business, as a whole, that a reduction in the particular rates would reduce the whole income below

the reasonable profit point. *Board of Trade of Winston-Salem v. N. & W. Ry.*, 16 I. C. C. 12.

⁸⁸ This is in part paraphrased from *Wilkes-Barre v. Spring Brook Water Co.*, 4 Lack. Leg. News, 367.

⁸⁹ *Long Branch Commission v. Tintern Manor Water Co.*, 70 N. J. Eq. 71, 62 Atl. 474.

in good times. These risks exist to some extent in all communities, but they are greater in some than in others.

Topic C. Policies Respecting Return Allowed

§ 320. General policy for allowing a fair return.

According to modern views upon the constitutional guaranties, an adequate return upon the true value of the property devoted to the public use, by those who conduct a public service, ought in all normal cases to be left; otherwise, it is conceded, they are in effect deprived of their property without due process of law, if their rates are so reduced by public authority as to leave no such adequate return. "The ordinary considerations of justice require that the money so invested by invitation of the Government should be allowed a fair return. This does not mean that we should permit rates which will guarantee all railroad investment, nor which will guarantee any railroad investment at all times, but we should allow rates which will yield to this capital as large a return as it could have obtained from other investment of the same grade. If rates formerly in effect have become insufficient, then higher rates should be permitted."⁹⁰ This is based upon sound public policy; it ought always be plain that those who invest their funds in some public employment are going to get a fair per cent upon their investment; because, unless they are assured of this, they will employ their money elsewhere; and many enterprises necessary for the public convenience will not be undertaken, nor will existing plants be extended. It is, then, not only due consideration for the rights of others, who have already invested their money in public service companies, but also an enlightened selfishness, with a view to the future, which dictates the policy that a reasonable return upon the value of the property used in the public service shall be held to be protected by the constitution. "If the present system

⁹⁰ Advance in Rates, Eastern Case, 20 I. C. C. 243, *passim*.

of private ownership of railways is to be continued, sufficient inducement must be extended to private investors." ⁹¹

§ 321. No right to raise rates in prosperous times.

In prosperous times business all over the country increases, and consequently the amount of traffic carried by the railways increases. Since in the railroad business the law of increasing returns because of decreasing costs has surprising scope, this increase of traffic will produce greater profits at the rates formerly established. To a certain extent, the carrier may enjoy these increased profits in prosperous times, without the obligation to reduce rates, but the carrier may not increase rates, because in prosperous times the shippers can afford to pay more. This contention was well handled by the Commission in one case,⁹² thus: "The test of the reasonableness of a rate is not the amount of the profit in the business of a shipper or manufacturer, but whether the rate yields a reasonable compensation for the services rendered. If the prosperity of the manufacturer is to have a controlling influence, this would justify a higher rate on the traffic of the prosperous manufacturer than on that of one less prosperous. The right to participate in the prosperity of a shipper by raising rates is simply a license to the carrier to appropriate that prosperity, or in other words, to transfer the shipper's legitimate profit in his business from the shipper to the carrier." ⁹³

§ 322. Commercial conditions affecting dividends.

To a certain extent, the dividends which a railroad company can earn are dependent upon commercial conditions generally. When crops fail or when commercial crises

⁹¹ *Spokane v. N. P. Ry.*, 15 I. C. C. 376.

⁹² *Central Yellow Pine Asso. v. Illinois C. R. R.*, 10 I. C. C. Rep. 505.

⁹³ In *Tift v. Southern Ry.*, 10 I. C. C. Rep. 548, the Commission

said: "The carriers necessarily and justly participate in the increased prosperity of their patrons in the resultant enlargement of their own business."

come, the general business of the common carrier inevitably falls off. Even if it should raise its rates very considerably, it would be difficult for it to maintain its regular dividends; and it is doubtful whether it ought to do so, and increase thereby the general distress. This may be pressed too far, and perhaps the point is overstated by those who insist that a railroad cannot say: When times are prosperous and dividends large, we win, when times are hard and business dull, the public must lose.⁹⁴ The business of the carrier cannot but be affected by the state of commerce in the country at large. It is, perhaps, true that, with good times and rising prices, the value of the property of a public service company increases with other values; and consequently it may justify higher earnings. And, if the carrier must suffer to a certain extent with others in bad times, he ought be allowed to recoup himself to some extent in prosperous times. Promoters and proprietors of roads have looked to the future, as they had a right to do, and as they were induced to do by the solicitation of the various communities through which they run, and by various encouragements offered by the State.⁹⁵

§ 323. More than current rates of interest not secured.

It is a disputed question whether more than the current rate of interest upon enterprises of similar character can be secured to bondholders. In the case of *Steenerson v. Great Northern Railway Company*⁹⁶ the court answered the question in the negative, as this further extract from

⁹⁴ See *Mathews v. Board of Corp.* Comm., 106 Fed. 7.

As the rates of defendants ought not to be fixed altogether with respect to the recent years of prosperity, so neither should they be established upon the basis of this year of adverse conditions. *City of Spokane v. N. P. Ry.*, 15 I. C. C. 376.

⁹⁵ See *Metropolitan T. Co. v.*

Houston & T. C. Ry., 90 Fed. 683.

Because the revenues of a carrier are high during a period of general prosperity, rates should not be reduced; the periods when it operated almost at a loss should be considered. *Florida Fruit & Vegetable Ass'n v. A. C. L. R. R.*, 17 I. C. C. 552.

⁹⁶ 69 Minn. 353, 72 N. W. 713.

the radical opinion of Mr. Justice Canty will show: "A railroad company is not entitled to a greater income during the acute stages of a panic because rates of interest are temporarily higher during such times. Permanent investments do not, as a general rule, bring higher rates of income during such times. It would rather seem from these quotations that 4 1-2 per cent per annum was in 1894 a very reasonable rate of interest on such railroad bonds, and that 6 and 7 per cent per annum was grossly excessive and unreasonable. If the railway company has made what turns out to be a bad bargain by issuing its bonds for 6 and 7 per cent interest per annum, that should be its misfortune, and not the misfortune of the public. As before stated, neither the State nor the public has either directly or indirectly guaranteed that rates of interest and rates of income would not fall, to the detriment of the railway company."⁹⁷

§ 324. How interest payable is considered.

It is very common, and not unnatural, to speak of interest payable upon bonded indebtedness as fixed charge, and therefore one of the items in making up the total of annual expenditures. Thus Mr. Justice Brewer speaks of it in the well-known case of *Chicago and Northwestern Railway Company v. Dey*:⁹⁸ "The fixed charges are the interest on the bonds. This must be paid, for otherwise foreclosure would follow, and the interest of the mortgagor swept out of existence. The property of the stockholders cannot be destroyed any more than the property of the bondholders. Each has a fixed and vested interest, which cannot be taken away. I know that often the stockholder and the bondholder are regarded and spoken of as having but a single interest; but the law recognizes a clear dis-

⁹⁷ When bond issues do not represent actual investment in the enterprise, interest upon such bonds is not protected. *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. 418.

⁹⁸ 35 Fed. 866, 1 L. R. A. 744.

Cited with approval in *Southern Pacific Co. v. Railroad Commrs.*, 78 Fed. 236.

inction. A mortgage on a railroad creates the same rights in mortgagor and mortgagee as a mortgage on my homestead. The legislature cannot destroy my property in my homestead simply because it is mortgaged, neither can it destroy the stockholders' property because the railroad is mortgaged. It cannot interfere with a contract between the company mortgagor and the mortgagee, or reduce the stipulated rate of interest; and so, unless that stipulated interest is paid, foreclosure of course follows, and the mortgagors' rights, the property of the stockholders, are swept away." But as a matter of fact, the real situation is that a public service company must produce a certain amount of net income, discovered by deducting the gross annual expenses from the gross income; and that net income must be enough to pay all security holders their rate of return,—to the bondholder his stipulated interest, to the stockholder his fair dividend. And according to modern constitutional law, both have the same protection, and both are subject to the same mischances."

§ 325. Profits divided not operating expense.

Profits must be paid, if at all, out of net income, and are in no sense operating expenses. "It seems to us very clear that in estimating the operating expenses of a railway stock dividends cannot be included. They are no part of the cost of operation. Nor should they be included, under any of the authorities, when ascertaining the reasonableness of a rate tariff. This is in no manner denying the defendant's right to earn sufficient to pay its operating expenses, interest upon its bona fide bonded indebtedness, and a proper dividend upon its lawfully issued stock shares or value of the investment." ¹ Upon appeal to the Supreme Court of the United States this language of the Minnesota court was affirmed: "In prov-

² Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. 418.

See Steenerson v. Gt. Northern Ry., 69 Minn. 353, 72 N. W. 713.

¹ State ex. rel. v. Minneapolis & St. L. R. R. Co., 80 Minn. 191, 83 N. W. 60.

ing that the cost of transporting *all* merchandise exceeded the rate fixed by the commission on this coal, the interest upon bonds and dividends upon stock were included in operating expenses. The propriety of the first is at least doubtful, the impropriety of the second is plain. We do not intend, however, to intimate that the road is not entitled to something more than operating expenses.”²

§ 326. Consolidation of interest and dividends.

In last analysis it will be agreed the company serving the public is entitled to a fair return upon its proper capital, otherwise, as it is held, the owners of that property are virtually being deprived of it without due process of law. This would seem to mean that they are entitled to what rate of profit is considered fair to all concerned, having in mind the character of the business upon that amount of the property devoted to public use that is represented by a valuation which is thought proper under all the circumstances. That is, upon property valued at, say, \$10,000,000, the owners are entitled to earn a profit, if they can get it, of say, \$800,000 per annum. If it is a corporation which has issued stock to the whole amount, it could properly pay 8 per cent dividends. But suppose it has outstanding \$5,000,000, 6 per cent bonds, can it not pay 10 per cent dividends on its remaining \$5,000,000, stock? It is submitted that it would not seem to be any concern of the State how it distributes the \$800,000. At all events, the Commission has pointed out that in determining what will be reasonable rates for the future, it may properly consider that, under the rates in effect, a large surplus has been accumulated in the past; but it should not fix rates unduly low for the purpose of distributing that surplus to the public.³ An advance is not necessarily unreasonable, even though for years a carrier

² Minneapolis & S. L. R. R. Co. v. Minnesota, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. 900. ³ Spokane v. N. R. Ry., 15 I. C. C. 376.

has regularly paid interest on the total bonded debt, and recently paid dividends on its stock.⁴

§ 327. Reductions ruinous only to certain companies.

A difficult question arises where, although there has been a drastic reduction of rates, certain companies are in so strong a position that their earnings are not cut below the minimum of fair profit, while with other companies the reductions will not only wipe out all profits whatsoever, but compel them to conduct their business at a loss. Whenever this is brought to the attention of the court, their attitude must be that they are dealing only with the case in hand, their sole function being to determine in the particular case before them whether this legislation will virtually confiscate the business property of this complainant.⁵ The consequence follows inevitably that, while the rates imposed may be found unreasonable, and therefore not enforceable as to some of the roads in the State, this does not necessarily render them unreasonable and unenforceable as to other roads doing business in the State.⁶ In considering the reasonableness of a whole schedule of rates the Commission may well at the outset make inquiry as to the general financial condition of the defendant railroad.⁷ But it is almost axiomatic that rates cannot be made so as to give high earnings to poorly placed and indifferently operated roads without making the charges extortionate.⁸

§ 328. Creating a fund for payment of uniform dividends.

A further suggestion has been made, which deserves consideration, that a railroad company, or any public service company, ought to be allowed to set aside in pros-

⁴ *Cady Lumber Co. v. M. P. Ry.*, 19 I. C. C. 460.

⁵ *Pennsylvania R. R. Co. v. Philadelphia County*, 220 Pa. St. 100, 68 Atl. 676, 15 L. R. A. (N. S.) 108.

⁶ *St. Louis & S. F. R. R. v. Hadley*, 168 Fed. 317.

⁷ *R. R. Commission of Nevada v. N. C. O. Ry.*, 22 I. C. C. 205.

⁸ *Advances on Rates, Western Case*, 20 I. C. C. 307.

perous times a reasonable amount as a surplus out of which it may maintain its dividend in less fortunate years. It is the practice of the strongest and best managed railroads and public service companies so to arrange matters by this process that they may always maintain their uniform dividend. This practice has the sanction of the Commission,⁹ as the following will show: "But it may be urged that after paying its fixed charges, taxes and dividend out of its net income for the year 1902, it had left but a comparatively small amount. That year was one of prosperity, and it can hardly be expected that conditions will continue without interruption as favorable. Ought not a railway to be allowed to accumulate, in some form, a surplus during fat years which may tide over subsequent lean years? To this we would unhesitatingly answer in the affirmative. In times like the present a railroad company should be allowed to earn something more than a merely fair return upon the investment; but we also think that it clearly appears that the Michigan Central is doing this." ¹⁰

§ 329. Greater profit for better service.

Reference might here be made to some recent theories, already resulting in some legislation dealing with the rate of return. The best of these proposals at present is for a sliding scale, the rate of dividend being permitted to increase as the price of the service to the public decreases. Some method of profit sharing, with increased returns for the corporations and better service for the communities, may be thought out which will spur the company not only to better service, but to wider extensions, not only to larger dividends, but to better maintenance. As the Commission has pointed out, a standard of rates must be so high that any needed carrier which serves the public

⁹ Re Advances in Freight Rates, 9 I. C. C. Rep. 382. has been improperly accumulated. *Spokane v. N. P. Ry.*, 15 I. C. C.

¹⁰ It will not, therefore, be assumed that when a surplus is found it 376.

with honesty may live; yet rates should still be so much below the possible maximum as to give high and exceptional reward to especially capable management.¹¹ This amounts to saying that it is realized that a standard living wage should be established for the average line, leaving the better road to get more, while the worse may get less.¹²

Topic D. Character of the Enterprise

§ 330. Larger returns in risky enterprises.

It follows from what has just been said that in a risky enterprise a large return may be demanded. The principle that as large a return is permissible as is obtained in businesses of similar character, covers the case. And the policy to induce people to undertake such services for the benefit of the public, requires a larger return for a more risky enterprise.¹³ "'Reasonable' is a relative term, and what is reasonable depends upon many varying circumstances. An equivalent to the prevailing rate of interest might be a reasonable return, and it might not. It might be too high or it might be too low. It might be reasonable, owing to peculiar hazards or difficulties in one place to receive greater returns there than it would in another upon the same investment." ¹⁴

§ 331. Hazards of the business considered.

The hazards of the business are therefore to be considered in determining what is a reasonable rate of return in the particular enterprise in question. An excellent example of this problem is to be found in the case of *Canada Southern Railway v. International Bridge Company*.¹⁵ It was shown in that case that the bridge com-

¹¹ *Advances in Rates, Western Case*, 20 I. C. C. 307.

¹² See *Hooker v. Interstate Commerce Commission*, 188 Fed. 342.

¹³ The quotation is from *Brunswick & T. W. Dist. v. Maine Water Co.*, 99 Me. 371, 59 Atl. 537.

¹⁴ The character of the enterprise as a factor in determining the rate of return is mentioned in *Cotting v. Kansas City S. Y. Co.*, 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. 30.

¹⁵ L. R. 8 App. Cas. 723.

pany at its established charges was earning something like fifteen per cent upon its investment. The opinion of Lord Chancellor Selborne alluded to the peculiar risks of the enterprise rather by way of dictum than as the basis of his decision. He said, on this point: "You cannot ask a court to say that the persons who have projected such an undertaking as this, who have encountered all the original risks of executing it, who are still subject to the risks which from natural and other causes every such undertaking is subject to, and who may possibly, as in the case alluded to by the learned judge in the court below, the case of the Tay Bridge, have the whole thing swept away in a moment, are to be regarded as making unreasonable charges, not because it is otherwise than fair for the railway company using the bridge to pay those charges, but because the bridge company gets a dividend which is alleged to amount, at the utmost, to fifteen per cent. Their Lordships can hardly characterize that argument as anything less than preposterous." ¹⁶

§ 332. Whether uniform return upon all property.

It is suggested in the case of *Steenerson v. Great Northern Railway Company* ¹⁷ that a difference is to be made in the rate of return to be allowed upon different kinds of property, in the particular case a lower rate upon the real estate constituting the terminals of the company. This can hardly be. All the property employed in the enterprise should be taken together and a uniform rate of return allowed upon it all by the general principles of public service law. However, as the point is a novel one, the opinion of Mr. Justice Canty is quoted. He said: "Let us now consider what in these times is a reasonable income on \$14,000,000, invested in these terminals, and

¹⁶ To the same effect is *Troutman v. Smith*, 105 Ky. 231, 48 S. W. 1084, allowing a ferryman a large profit on the capital invested because

of the notorious hazards of the business.

¹⁷ 69 Minn. 353, 72 N. W. 713.

\$30,000,000, invested in the rest of the road. The great value of the real estate covered by these terminals is given to it by anticipating the future. Very little of this real estate is in or near to the business center of either city. Most of it is outlying city property and suburban property. It is safe to say that other real estate similarly situated, in the same portions of St. Paul and Minneapolis, does not, on an average, yield an income of 1 per cent per annum above the taxes on the price of valuation at which it is held; and there is, as a general rule, no use to which such property can be put that will cause it to yield any greater income. Such real estate is valued, not on account of its present power to produce an annual income, but because it is believed that it will be still more valuable in the future. The owner of such property cannot expect to eat his loaf and still have it. He cannot expect that the property will pay a full-sized annual dividend, and at the same time double or treble in value every 10 or 20 years. He expects his dividends to accumulate in the form of increase in value." It may be that there is justification in disposing of this case in the way in which Mr. Justice Cauty does; for if these great tracts of land are being held at inflated valuation full return upon that valuation ought not to be expected.¹⁸ But, of course, if this policy is adopted there should not be any complaint, if later the company claims the unearned increment, which represents their foregone profit.

§ 333. Rate of interest dependent upon safety.

Just what rate of interest a public service company should be allowed to pay upon its bonded indebtedness it is difficult to determine by rule, since the circumstances will be different in different cases. Whatever it is obliged

¹⁸ In a few cases the point has been raised that all of the property belonging to the public service company should not come in for returns

upon the same basis. See *Wilkes-Barre v. Spring Brook Water Co.*, 4 Lack. Leg. News (Pa.), 367.

to pay to sell its bonds at par if the negotiations for the issue are conducted with good faith would be the test. And that would depend upon the stability of the business to the mind of the lenders. Public service bonds are sold on the exchanges from as low as a 3 per cent basis to as high as a 12 per cent basis, and doubtless will always continue to do so. The suggestion that some fixed standard should be taken, such as the rate paid upon United States, State, or even municipal bonds in the locality in question has no justice in it. That was said very plainly by Mr. Justice Edwards in *Wilkes-Barre v. Spring Brook Water Co.*,¹⁹ when an application was made to him under the Pennsylvania statute to order a reduction of rates by a water company which was earning barely 5 per cent, allowing only 1 per cent for depreciation: "Reference has been made to the interest paid on Wilkes-Barre city bonds and on large sums otherwise safely invested. Such investments are not by any means analogous to investments in waterworks. Good bonds such as Wilkes-Barre bonds remain intact. They are not liable to change or diminution in principal. At a time certain the principal is to be paid to the investor to the last cent. If the rate paid on such investments shall determine the percentage of profit to be paid water companies there would be no inducement for anybody to invest money in works of a public nature. It would be much less wearisome to sit down twice a year and cut off coupons from bonds. Enterprise and industrial progress would be at a standstill."²⁰

§ 334. Risk by reason of depreciated security.

A very complicated instance of this general problem came up in the case of *Steenerson v. Great Northern Railway*,²¹ already much quoted. The problem and its solution are thus stated by Mr. Justice Cady in his own words:

¹⁹ 4 Lack. Leg. News (Pa.), 367. *Milwaukee Elec. Ry. Co. v. Milwaukee*, 87 Fed. 577.

²⁰ Similar language is used in: ²¹ 69 Minn. 353, 72 N. W. 713.

"A large amount of railroad bonds floated years ago, for the full cost of the roads, at high rates of interest, are now very poorly secured. And on the maturity of such bonds, or when an attempt is made to reorganize the road on foreclosure, it is found difficult to scale down the amount of indebtedness to a point where the road will, under present conditions, be sufficient security for bonds drawing a fair rate of interest. These things tend to make the present rates of interest on railroad securities unreasonably high. But should the losses caused by all of these economic changes be borne by the public, or by the owners of the railroad? There can be but one answer to this question. As we have repeatedly stated, neither the State nor the public have ever guaranteed that railroads would always be worth the amount originally invested in them, or that what is a reasonable rate of income would not be less in the future than it was at the time of the investment, and have never guaranteed, directly or indirectly, either the interest or principal of railroad bonds. These losses must be borne, not by the public, but by the owners of the railroad; and, as against the public, the holders of the bonds have no greater rights than the railroad company itself."

§ 335. Rate of return dependent upon locality.

It is a part of the rule under discussion, that the rate of return which the company in question ought to be allowed to receive is that prevailing in the locality where the company is carrying on its business. This was said in *Louisville & Nashville Railway Company v. Brown*.²² In holding a reduction of rates unjustifiable, Judge Pardee said: "At present, I do not think it necessary to consider exhaustively the question as to how much per cent of net revenue, based on the actual value of the railroad and equipment, a railroad company is entitled to earn. I think it will be conceded that as long as the rates are reasonable, and do not unjustly discriminate, the company is

²² 123 Fed. 946.

entitled to earn some amount; and it seems reasonably clear to me that, if entitled to earn something under the above conditions, it is entitled to earn under the same conditions a compensatory amount equal, at least, to the usual and legal rate of interest in the locality where the railroad is situated. Judging by the business of the past 19 years, in connection with the showing made on this hearing as to present and future business, I conclude that there is no prospect in the immediate future that the net earnings of the complainant's railroads in Florida will approach an amount at all equal to the interest on the value of the said railroads at the usual rate prevailing in Western Florida."

§ 336. Investment in public service.

Finally, the advantages of investment in public service are strongly presented in the following extract from the opinion of the Commission in the Advance in Rates Case of 1910. "What business can be more attractive to the investor than this, in which no rival is to be apprehended, where the amount of business is assured, and where the price for the transaction of that business is protected by the fundamental law of the land. All this has long since reflected itself in the prices of railway securities. Ten years ago a high-grade, long-time railroad bond like the 3 1-2 per cent New York Central underlying mortgage sold at par. To-day, owing apparently to the increase in the rate of interest a similar bond, in order to bring par, must bear a rate of 4 per cent, or perhaps slightly more. These railroad bonds command nearly as high a price when no question of local taxation intervenes as do municipal bonds. The price of railroad stocks in the past has not been controlled by the same considerations as that of railroad bonds. These stocks have been largely the subject of speculation and the prices have been determined by other considerations than the mere rate of dividend. These conditions are changing. In Official

Classification territory the day of railroad construction and railroad consolidation has given place to that of railroad operation. The successful railroad magnate of the future in this territory will be he who can operate his properties most economically and most satisfactorily."

§ 337. Present tendencies in regulation.

It is significant that in the Five Per Cent cases of 1914 a more liberal policy had been pursued in this respect. It is still true, however, that there is as yet no fixed percentage applicable to all cases established. Each case is still to be judged on its own merits; it may well be that a railroad in one community would be entitled to one rate of return, while another line in another community would be entitled to a different rate. It may be that a large and solidly established company will not be entitled to as high a return as a smaller one which is struggling against adverse circumstances. The most that can be said by way of general principle, is that the return should be at least the average return which is earned by other classes of business of the same degree of hazard in the same community. The Commission in fixing a rate of return should, if it is well advised, be liberal lest too strict a policy result in turning capital to other fields of enterprise. The United States still needs development by improvement of its means of transportation. If the period of extensive building is coming to an end, the possibility of intensive development is only in its beginning. In its valuations of properties, the Commission should guard against inflation, but should be liberal in establishing the rate of return on that value.

CHAPTER VIII

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§ 340. Provisions of the Act.

The functions of the Commission in regard to the determination of operating expenses are by no means inconsiderable. It can always call upon the carriers for reports of various sorts; and now by the expansion of its practice in establishing rules for keeping accounts, it keeps a very close control over the proper division between fixed charges and operating expenses. These reports among other things must, in accordance with section 20, include the number of employees, and the salaries paid each class; the accidents to passengers, employees, and other persons, and the causes thereof; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet; and the Commission has been in the broadest way possible given power, in its discretion, for the purpose of enabling it the better to carry out the purposes of the Act, to prescribe a period of time within which all common carriers subject to the provisions of this Act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept. The Commission by further provisions of section 20 may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this Act, including the accounts, records, and

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memoranda of the movement of traffic as well as the receipts and expenditures of moneys. The exercise of the powers conferred upon the Commission under these provisions of the Act is also discussed in Chapter XX, particularly under Topic A.

§ 341. Real cost of operation.

The real cost of operation is not so easy a figure to determine as one might first suppose. If brought to the test of inquiry before the courts, not only must the actual expenditures be shown, but they must be defended, if attacked, as reasonable in themselves. Certain items of annual expenditure should obviously be included as annual charges, such as wages and supplies, provided that such expenditures have not been unreasonable. But as to other expenditures there is difficulty in deciding whether they should be included as current expenses or provided for out of new capital, such as replacements and betterments. Involved in this problem is the accounting permissible in allowing for depreciation and reparation. And in this connection the propriety of setting aside a sinking fund or providing against amortization should be considered. Altogether, it will be seen that this is not a matter to be dismissed with the accepted rule that only proper annual charges should be deducted from gross income, while all expenditures for lasting improvements should be provided for from new capital. These are fundamental issues in many cases brought before the courts; a company must make full disclosure of its earnings and expenses when it assails as confiscatory the rates fixed by the authorities to which the power to act has been delegated.

Topic A. Cost of Performing Service

§ 342. Cost of rendering service.

Before there can be any question of income on the capital employed, the necessary annual charges must be met by

the rates; and first of all the actual cost of service furnished. This involves the payment of wages, and the purchase of current supplies. The general principle was concisely stated by Mr. Justice Brewer in *Chicago and Northwestern Railway v. Dey*:²³ "Compensation implies three things: Payment of cost of service, interest on bonds, and then some dividend. Cost of service implies skilled labor, the best appliances, keeping the roadbed and the cars and machinery and other appliances in perfect order and repair. The obligation of the carrier to the passenger and the shipper requires all these. They are not matters which the carriers can dispense with, or matters whose cost can by them be fixed. They may not employ poor engineers, whose wages would be low, but must employ competent engineers, and pay the price needed to obtain them. The same rule obtains as to engines, machinery, roadbed, etc., and it may be doubted whether even the legislature, with all its power, is competent to relieve railroad companies, whose means of transportation are attended with so much danger, from the full performance of this obligation to the public."²⁴

§ 343. Net earnings in general.

The proper determination of net earnings is by no means the simple problem it might seem. Of the total costs of conducting transportation something in the vicinity of one-half are what may be termed out-of-pocket costs—that is cost of fuel and wages, and repairs to locomotives and cars.²⁵ It is obvious that there are many

²³ 35 Fed. 866, 1 L. R. A. 744, 2 Int. Com. Rep. 325.

See further *Missouri Pacific Ry. v. Tucker*, 230 U. S. 340, 57 L. ed. 1507, 33 Sup. Ct. 961.

²⁴ *Chicago, M. & S. P. Ry. v. Tompkins*, 176 U. S. 167, 44 L. ed. 418, 20 Sup. Ct. 336.

See also *Wood v. Vandalia R. R.*, 231 U. S. 1, 34 Sup. Ct. 7.

²⁵ *Louisville & N. R. R. C. & C. Rates*, 26 I. C. C. 20.

Where the operating ratio is extraordinarily high, the Commission will not feel justified in ordering a reduction. *Nebraska State Railway Commission v. C., B. & Q. R. R.*, 23 I. C. C. 121.

other expenditures to be accounted for as annual charges, as to which it is difficult to state rules of apportionment in any itemized schedule of costs, but which nevertheless enter into the cost of performing any part of the transportation rendered by the company in question. The character of this problem in general was excellently stated by the Commission in one proceeding²⁸ thus: "The item of conducting transportation cannot be much modified. Whenever a train moves so much coal must be used and so many men employed at the time of the movement. With maintenance of way and equipment this is not so. A certain amount must be expended to keep the roadbed and other permanent structures and the rolling stock in a going condition, but a certain other amount, although necessary to keep the property good in the long run, may be laid out sooner or later according to the will of the management. For example, rails must be relaid but the time of relaying can usually be varied for a considerable period. So in the renewal of a bridge or a culvert there is a leeway of years usually. A car or an engine can be used after good economy would require its abandonment. The building of a station can be postponed almost indefinitely. From these considerations it results that the management can without taking from or adding to the items which are actually needed to keep the property good vary for a particular year or even for a series of years by several hundred dollars per mile the cost of operation and thereby the net results. In addition to this the amount charged to maintenance may be greatly varied by the manner in which the accounts are kept. A new car is purchased in the place of an old one. It is largely more efficient and more expensive. What part of it shall be charged to main-

²⁸ Rates from St. Louis to Texas Points, 11 I. C. C. Rep. 238.

Where the margin of profit to the carrier on a low grade commodity was small to begin with and the business itself is not so desirable now

as formerly, the enhanced cost of operation may properly be offset by an increase of the rate. *Mountain Ice Co. v. D., L. & W. R. R.*, 15 I. C. C. 305.

tenance and what part to permanent improvement? So of the replacement of rails, bridges, culverts, depots and whatever enters into the construction and equipment of a railroad. Some railroads carefully separate what is properly maintenance from what is strictly an addition; others are liberal in the making of these distinctions, charging more to maintenance and renewal and less to betterment, while still others charge all improvements against operating expenses. The general tendency in all parts of the country is to charge more to operation than formerly."

§ 344. Salaries paid to officials.

The salaries of officials must, of course, be paid, as part of the annual charges; but these salaries must not be fixed at an extravagant amount. If a group of stockholders who controlled a majority of the stock could vote themselves enormous salaries, and deduct the amount from the receipts of the company before making a return to capital, the highest possible rates might be justified, and the rights of the public be ignored. This question was considered, and well discussed, by Mr. Justice Brewer in *Chicago and Grand Trunk Railway v. Wellman*:²⁷ "It is agreed that the defendant's operating expenses for 1888 were \$2,404,516.54. Of what do these operating expenses consist? Are they made up partially of extravagant salaries,—fifty to one hundred thousand dollars to the president, and in like proportions to subordinate officers? Surely, before the courts are called upon to adjudge an act of the legislature fixing the maximum passenger rates for railroad companies to be unconstitutional, on the ground that its enforcement would prevent the stockholders from receiving any dividends on their invest-

²⁷ 143 U. S. 339, 36 L. ed. 76, 12 Sup. Ct. 400.

In *St. Louis & S. F. Ry. Co. v. Hadley*, 168 Fed. 317, the court refused to take it into consideration

as against a legislative reduction of rates that the companies would be compelled to reduce the wages of their employees.

ments, or the bondholders any interest on their loans, they should be fully advised as to what is done with the receipts and earnings of the company; for, if so advised, it might clearly appear that a prudent and honest management would, within the rates prescribed, secure to the bondholders their interest, and to the stockholders reasonable dividends." ²⁸

§ 345. Cost of supplies.

The articles which a railroad company has occasion to buy are very numerous. Some of these are extensively used, others only in limited quantity. Evidently no general average can be constructed which is reliable without knowing the quantity which is used of each article. "An advance in the price of coal would be of vital consequence to a railway and would be in no wise offset by a corresponding decline in feather dusters." ²⁹ These are general questions considered in passing upon the reasonableness of rates. The prices of almost all supplies used in railway construction and operation have advanced. "Comparing 1896 with the present year (1910) nearly all kinds of supplies which enter into the construction, maintenance, and operation of a railroad have very much increased in price. Nearly one-half the cost of operation is labor, and it is said that within that period the wages of railroad employees have advanced 30 per cent. We are told that not only has the price of a day's labor increased, but that the efficiency of that labor for various reasons has decreased. Legislative enactment, both of the federal and of the State Governments, has in the interest of the public and the employees required the employment of additional labor. Laws like the employers' liability act

²⁸ This quotation is included with approval in the opinion of the court in *Tucker v. Missouri Pacific Ry. Co.*, 82 Kans. 222, 108 Pac. 89.

According to a recent decision, a court will take into account the in-

creased cost of labor by reason of the reduction of hours. In *re Arkansas R. R. Rates*, 168 Fed. 720.

²⁹ *Re Advances in Freight Rates*, 9 I. C. C. Rep. 382.

will add to the damages which railroads must pay for injuries to their employees.”³⁰

§ 346. Unreasonable expenditures.

The Commission has had occasion several times to animadvert upon the practices of the railways in paying extraordinary sums to get business. These must obviously be tested like other operating expenses of the company, and if found to be unduly high without justifiable reason they should be disallowed. Thus in an early investigation by the Commission it reported:³¹ “Another cause is found in the active competition for traffic, under the stress of which a vast number of soliciting agents are employed, whose offices are found not only on the corners of the most expensive streets of every city, but in the rural communities as well; and who represent, both in their fixed establishments and in their movement up and down the land, not only the carriers directly, but also various so-called ‘lines’—red, white, or blue, as the case may be; whose only interest is to obtain traffic; who have little responsibility of their own or to their ultimate employers; and whose object in life is necessarily to make a record of success in securing business which shall warrant the continuance of their employment and of their pay. All this gilded advertisement and persistent solicitation in the end is paid for by the public. The business exists and the public service of transportation must be done, whether or not any agent intervenes to help along the contract. Whatever arrangements and considerations are devised for the purpose of securing a shipment to a given line are necessarily at the expense and to the prejudice of some other shipper.”³²

³⁰ Re *Advances in Rates*, Eastern Case, 20 I. C. C. 243.

³¹ Re *Underbilling*, 1 Int. Com. Rep. 813, 1 I. C. C. Rep. 633.

³² On the general principle that the railroads must look to the basis

of their operations to increase their net, instead of expecting advances in rates, see the *Five Per Cent Cases*, opinions of August 2, 1914, and December 18, 1914.

§ 347. Improvident arrangements.

And in one case before it where it was shown that large commissions—20 per cent of the gross receipts in one case—were being given by certain railroads for the purpose of developing their milk traffic, the Commission said squarely that such expenditures could not be charged against the shippers in making up the rates. To quote the language used: "The Lackawanna and Lehigh Valley are parties to agreements entered into mainly for the purpose of developing their milk traffic, and under which compensation is afforded to the other contracting parties equal to a considerable share of the gross receipts from the transportation. Such compensation, as the business has been increased or 'developed' on the Lackawanna, or may become greater on the Lehigh Valley, seems extravagant, but whether either agreement is disadvantageous to the carrier or otherwise is matter for it to determine. Improvident management of the road is primarily a matter of internal or corporate concern, to be dealt with by the corporation and its creditors among themselves."³³ But extraordinary or unnecessary cost of operation or management cannot be permitted to cause unreasonable or unjust rates, discriminations, preferences or prejudices."³⁴ In a later case³⁵ where it was shown that the expense of doing the express business was high by reason of the fact that large percentages, often as high as 55 per cent of the gross receipts, were paid to the railroads for the exclusive privilege of doing business over their lines, the Commission said that neither legally nor morally could it consider that these arrangements in themselves would justify higher rates for transportation than would otherwise be legal.³⁶

³³ Citing *Shamberg v. Delaware, L. & W. Ry.*, 3 Int. Com. Rep. 502, 4 I. C. C. Rep. 660.

³⁴ *Milk Producers' Asso. v. Delaware, L. & W. Ry.*, 7 I. C. C. Rep. 92.

³⁵ *Hormel & Co. v. C., M. & St. P. Ry.*, 26 I. C. C. 112.

³⁶ *In re Express Rates*, 28 I. C. C. 132.

§ 348. Estimating labor cost.

Estimating labor cost is by no means so simple a process as it seems. In one important case before the Commission,³⁷ this matter was examined rather elaborately, as the railways affected claimed the right to advance rates by reason, for one cause, of the increase in wages. On that point the Commission said, in part: "The railroads insist that this advance in the per diem wages does not represent the actual increase in the cost of the labor itself for the reason that owing to the regulations and requirements of the various labor organizations that labor is less efficient. For illustration, a station agent formerly did the work of a telegraph operator whereas to-day two persons must be employed. Without expressing any opinion as to the reasonableness of these regulations and requirements we are inclined to think that the claim is well taken and that there has been for various reasons a loss, as compared with ten or twelve years ago, in the quantity of work which a day's labor means." In a later proceeding, of even greater importance, the Commission said: "The same remark would seem to apply to wages as they stand after the recent increases. Railroad labor, certainly organized railroad labor, is probably as well paid, and some say better paid, than labor of other kinds, upon the average. Railroad employees will hardly expect to receive wages which exceed those paid to other forms of labor for the same grade of service, and this Commission certainly could not permit the charging of rates for the purpose of enabling railroads to pay their laborers extravagant compensation as measured by the general average compensation paid labor in this country as a whole."³⁸

§ 349. Scientific management.

Statements of increased cost of transportation can have little weight when presented in the abstract, with no at-

³⁷ Rates from St. Louis to Texas Points, 11 I. C. C. Rep. 238.

³⁸ Advance in Rates, Eastern Case, 20 I. C. C. 243.

tempt to consider corresponding reductions resulting from greater efficiency. It must be carefully observed that, owing to the introduction of certain economies in railroad operation, a given quantity of work produces a much greater result; these different economies come mostly to the same end, the handling of a greater amount of paying freight in a train.³⁹ Concerning the possibilities of getting greater results at lower costs out of the same laborers, even at higher wages, by "scientific management," so called, the Commission said that it could not find that the railroads could make good any part of these actual advances in wages by the introduction of scientific management,⁴⁰ but that the Commission still holds to the principle that, before any general advance can be permitted, it must appear that carriers have exercised proper economy in conduct of their business. And certainly rates cannot be advanced because of wasteful, corrupt, or indifferent management.⁴¹ To put it mildly, it is not clear to the Commission that the public should stand responsible for mistakes made in management of railroads.⁴² Railroad management should be most progressive; and continual increases in efficiency are to be looked for.⁴³ If carrier does not see proper to make improvements that will reduce cost of operation, it cannot claim that it may raise rates because cost approaches or overtakes revenue.⁴⁴ For instance, increased tractive power of locomotives would tend to reduce the operating cost per unit of freight transportation.⁴⁵

§ 350. Loans.

It is obvious that a loan made by a company during

³⁹ *Hornel & Co. v. C., M. & St. P. Ry.*, 26 I. C. C. 112.

Atchison, T. & S. F. Ry., 20 I. C. C. 463.

⁴⁰ *Advance in Rates, Eastern Case*, 20 I. C. C. 243; *Advance in Rates*, July, 1914.

⁴¹ *Arlington Heights Fruit Exchange v. S. P. R. R.*, 20 I. C. C. 156.

⁴² *The Five Per Cent Cases*, I. C. C. Aug. 2 and Dec. 18, 1914.

⁴³ *Louisville & N. Co. C. & C. Rates*, 26 I. C. C. 20.

⁴⁴ *R. R. Commission of Texas v.*

⁴⁵ *Traffic Bureau of W. v. L. & N. R. R.*, 28 I. C. C. 533.

the year cannot be charged as an annual expense. In *Southern Pacific Co. v. Railroad Commissioners* ⁴⁶ that question actually came up for decision. It appeared that the Southern Pacific Company, as lessee, had entered into an elaborate lease with the Oregon & California Company as lessor, by the terms of which the net earnings received by the lessee should be applied to pay the interest on the bonded indebtedness of the lessor with a proviso that if there should not be a sufficiency of net earnings upon the line to pay this interest the Southern Pacific Company might pay the same on account of the Oregon & California Company and charge the payment to it, being entitled to reimburse itself from future net earnings with six per cent interest until paid. The Southern Pacific Company claimed that a payment which it had made on this account should be put in as a current expenditure in determining whether the rates fixed by the California Commission left it a reasonable return above proper expenses. But the court held otherwise; on this point Judge McKenna said: "Was the payment of the interest a loss to the Southern Pacific Company? Clearly not. It is secured to it, and is to be reimbursed to it, and is charged in the report as a 'balance deficit payable by Oregon & California Railroad Company.' Clearly, again, if it had not been paid, it could not be claimed as a loss. If paid, and to be reimbursed and secured, it cannot be claimed as a loss, if the debtor or the security be good. I cannot assume now that the debtor or the security will not be good. It may be, of course, that it will not be good, but I can only deal with present conditions, or, at any rate, with those likely to occur within a reasonable period of time. That, under the lease, the payment of the deficit is not a charge on the Southern Pacific Company, is not only evident from its terms, but evident from the allegations of the bill."

⁴⁶ 78 Fed. 236.

^a It seems that if there has been inefficient financiering, in engaging on speculative ventures at inflated

§ 351. Taxes.

Taxes for the year are obviously a proper annual charge. Overdue taxes for past years paid during the year can hardly, however, be properly regarded as an annual charge.⁴⁸ Upon the policy for the State to pursue in taxing public service companies in general and railroads in particular, there is and may be much difference of opinion. Such companies should, of course, be taxed upon their tangible property at its locus, and this is generally done. But upon the question of whether there should be a high franchise tax opinion differs, although it is now recognized that such taxes are constitutional enough. It may be pointed out, however, that if too heavy a franchise tax is levied upon a railroad company, it is bound in the end to react upon the rates which the railroad will charge the public, as the payments made for taxation requirements are obviously annual charges. This matter was thus discussed by the Commission in one proceeding.⁴⁹ "Several of the carriers stated that there was a tendency on the part of States and municipalities to increase the taxes levied upon railroads, and that this imposes an additional burden. Railroad property, like every other species of property, should bear its just burden of taxation. If the property has been once taxed, the stock which represents that property ought not to be taxed a second time; and when it is, the tax on the property is in the nature of an operating expense."

Topic B. Expenditures on the Plant

§ 352. Expense of equipment and maintenance.

As the railroad is obliged to provide a sufficient equipment for the proper accommodation of the public, and to keep all its appliances and premises in good condition,

prices, the company and not the shipper should bear the loss. The New England Investigation, 27 I. C. C. 1.

⁴⁸ *Southern Pacific Co. v. Railroad Comrs.*, 78 Fed. 236.

⁴⁹ *Re Advances in Freight Rates*, 9 I. C. C. Rep. 382.

the cost of maintaining the equipment is, of course, to be repaid from the rates. The Commission is clear that normally rates should be provided for keeping its equipment up to modern standards of operation.⁵⁰ Maintenance of way and structure should be always taken into account in estimating the cost of operating the road.⁵¹ The public policy of permitting full allowance for upkeep is sufficiently obvious to the Commission.⁵² And in passing on rates this has been reiterated as occasion arises; for it is well understood nowadays that, when it comes to the question of service, the demand is that it shall be adequate, and rates should be allowed sufficient to bring that about.⁵³ The public cannot expect to get from the carriers more than it is paying for; and it must be realized that low rates have an inevitable tendency to result in inadequate facilities.

§ 353. Cost of rolling stock.

The expense from use of rolling stock constitutes one of the heavy items in the operating charges of a railroad. As has been pointed out, this is a charge which tends to increase rather than diminish. In one proceeding before the Commission the ground was gone over in a thorough manner, as the following extract will show:⁵⁴ "One of the most important items which enter into the expense of railroad operation is the cost of equipment. For the purpose of arriving at some satisfactory opinion on this subject the Commission examined in this proceeding the first vice-president of the American Car and Foundry Company and in another similar proceeding the general manager of the construction department of the Pullman Company. The testimony of these gentlemen agrees.

⁵⁰ *Meeker & Co. v. Lehigh Valley Ry.*, 21 I. C. C. 129.

⁵¹ *Standard Mirror Co. v. P. R. R.*, 27 I. C. C. 200.

⁵² *May Bros. v. Y. & M. R. R.*, 26 I. C. C. 323.

⁵³ *National Lumber Exporters Assn. v. St. L., I. M. & S. Ry.*, 28 I. C. C. 215.

⁵⁴ *Rates from St. Louis to Texas Points*, 11 I. C. C. Rep. 238.

The cost of building a car also of necessity varies with the changes in cost of materials and labor which have been about the same in the car shop as in other railroad operations. What should be especially noted, and what largely accounts for the apparent great increase in price is the fact that the car of to-day differs radically from the car of ten or twelve years ago. The evidence as to the cost of locomotives is less complete than in case of cars. Engines, like cars, are of much greater capacity than formerly, and they are also equipped with many improved devices which are supposed to add to the value in actual operation. In units of tractive power, the difference is less when given by the engine. Even when so measured we are inclined to think that they were distinctly higher in 1902 than in 1892. The ownership of the various locomotive works of the United States has been so adjusted within the last few years that 'suicidal competition' no longer exists; and this fact is easily observed in the price which railways are compelled to pay."⁵⁵

§ 354. Losses by accident.

A certain amount of loss by accident is inseparable from the conduct of any business, and this is particularly true of a business having so many unavoidable dangers as that of railroad operation. In so far as these losses are without fault of anyone concerned the sums paid to make reparation for them may obviously be charged as an expense of operation. But more than this, it seems, must be conceded; a certain amount of negligence by employees cannot be avoided, and these losses also seem inseparable from the conduct of the business. The only losses which the railroad company may not properly charge against the public, therefore, are those which result from its own reckless management, or its willful failure to provide adequate

⁵⁵ An advance will not be justified because of acquiring new equipment, where the former equipment was sufficient. *City of Spokane v. N. P. Ry. Co.*, 19 I. C. C. 162.

facilities.⁵⁶ These points were excellently made in a ruling some years ago by the Commission.⁵⁷ "The defendant states that excessive damages are claimed by Texas shippers with respect to the shipment of live stock; it apparently insists that these damages are unjust and that it is compelled to recoup itself by an advance in the rate. This Commission can hardly find that a judgment rendered in due course of judicial procedure is unjust or excessive. Nor can we assume that this defendant has been coerced into payment of unreasonable or unjust damages by the bringing of such suits. The fact, however, that claims of that kind are made in large amounts, that such claims are often compromised by the carriers, that when not compromised they result in large verdicts and that as a consequence the carrier is obliged to pay large sums for damage to live stock in transit is undoubtedly proper to be shown. It is an incident in the transportation of that commodity, which may properly be taken into account by the railway in establishing its tariff. If for any reason these claims for damages have become more frequent than they were formerly, without fault upon the part of the railway, that might be a reason for increasing the rate. It should be carefully observed, however, that the defendant ought not by this means to escape from its own negligence."

§ 355. Betterments considered as maintenance.

It is not always easy to determine whether replacement construction of the plant of a public service company constitutes an annual or a capital charge. Current repairs obviously constitute annual charges. Outright extensions just as obviously should be put into the capital account. But as to replacement, and more particularly as to improvements, problems arise which may be handled in different ways. Since they may be handled in different

⁵⁶ See *In re Arkansas R. R. Rates*, 168 Fed. 720. *change v. Texas & P. Ry.*, 10 I. C. C. Rep. 331.

⁵⁷ *New Orleans Live Stock Ex-*

ways not unreasonably, it cannot be said that a corporation is acting unreasonably in adopting one policy or the other. This was pointed out by Mr. Justice Bradley when, in *Union Pacific Railroad Company v. United States*,⁵⁸ the Supreme Court was called upon to decide whether that company had acted unreasonably in so arranging its finances that it did not appear to be making such net earnings as by the terms thereof were to be applied to the reduction of certain of its bonds. "As a general proposition, net earnings are the excess of the gross earnings over the expenditures defrayed in producing them, aside from and exclusive of the expenditure of capital laid out in constructing and equipping the works themselves. It may often be difficult to draw a precise line between expenditures for construction and the ordinary expenses incident to operating and maintaining the road and works of a railroad company. Theoretically, the expenses chargeable to earnings include the general expenses of keeping up the organization of the company, and all expenses incurred in operating the works and keeping them in good condition and repair; while expenses chargeable to capital include those which are incurred in the original construction of the works, and in the subsequent enlargement and improvement thereof."⁵⁹

§ 356. Improvement of existing plant.

It may fairly be said that it has been the American system of conducting public service companies to charge to maintenance, as an annual expense, betterments, replacements, improvements, and repairs. The question is one of policy, which is usually left to the discretion of the directors. There is but little danger that any board will cause a very large or undue portion of their earnings to be absorbed in permanent improvements.⁶⁰ The prac-

⁵⁸ 99 U. S. 402, 25 L. ed. 274.

⁵⁹ See also *Metropolitan Trust Co. v. Houston & T. C. R. R. Co.*, 90 Fed. 683.

⁶⁰ The Commission feels that rebuilding and strengthening bridges and trestles and laying heavier rails are expenses incident to increased

tice will only extend to those which may be required, from time to time, by the gradual increase of the company's traffic, the dispatch of business, the public accommodation, and the general permanency and completeness of the works. When any important improvement is needed, such as an additional track, or any other matter which involves a large outlay of money, the owners of the road will hardly forego the entire suspension of dividends in order to raise the requisite funds for those purposes, but will rather take the ordinary course of issuing bonds or additional stock. But for making all ordinary improvements, as well as repairs, it may be better for the stockholders, and all those who are interested in the prosperity of the enterprise, that a portion of the earnings should be thus employed.⁶¹ In one sense, a railroad is never completed. There is never, or hardly ever, a time when something more cannot be done, and is not done, to render the most perfect road more complete than it was before. Moreover, this American system of maintenance of way from earnings has in practice proved itself far superior to the English system of issuing new securities for every sort of improvement, which accumulates fixed charges, and otherwise hampers the railway by excessive capitalization.

§ 357. Replacement considered as repair.

In the leading case of *Reagan v. Farmers' Loan & Trust Company*,⁶² it was contended that the cost of new rails should be charged to construction, and not to expenses of operation; but Mr. Justice Brewer said: "Now, it goes without saying that, in the operation of every road,

tonnage and are indicative of prosperity rather than distress. *Memphis Freight Bureau v. L. & N. R. R. Co.*, 26 I. C. C. 402.

⁶¹ But, when the cost of what are clearly betterments, in contrast to

maintenance, is charged to operating expenses, the Commission feels that this constitutes no justification for increase in rates. *New York Butter and Cheese Rates*, 28 I. C. C. 330.

⁶² 54 U. S. 362, 38 L. ed. 1014, 14 Sup. Ct. 1047.

there is a constant wearing out of the rails, and a constant necessity for replacing old with new. The purchase of these rails may be called 'permanent improvements,' or by any other name; but they are what is necessary for keeping the road in serviceable condition. Indeed, in another part of the report, under the head of 'Renewals of rails and ties,' is stated the number of tons of 'New rails laid' on the main line. Other items therein are for fencing, grading, bridging, and culvert masonry, bridges and trestles, building, furniture, fixtures, &c. It being shown affirmatively that there were no extensions, it is obvious that these expenditures were those necessary for a proper carrying on of the business required of the company." ⁶³ Upon the whole every liberty possible should be given the companies to improve their properties out of current earnings; and it is only when it is plain that outright new construction is being entered upon that the companies should be obliged to issue new securities to provide capital. For as long as the company has a continuous policy that, as improvements are needed in each year, they shall be provided for out of annual earnings, the maintenance of such a policy will roughly from year to year throw a fair share upon each year which gets the benefits of the work done in other years.

§ 358. Permanent improvements should not be annual charge.

However it may be in doubtful cases, where continual replacements, going on from year to year, may not unreasonably be considered as equivalent to annual charges to repair account, it is obvious that permanent improvements should not be charged as annual expenditures in the year in which they are constructed, but should be carried to capital account. The United States Supreme Court ⁶⁴

⁶³ *Acc. Southern Pac. Co. v. Railroad Comrs.*, 78 Fed. 236.

⁶⁴ *Illinois C. R. R. Co. v. Interstate Com. Comm.*, 206 U. S. 441, 51 L. ed. 1127, 27 Sup. Ct. 700.

was perhaps speaking within limits when it held that the Commission was not acting unreasonably in disallowing, as operating expenses of the Illinois Central Railroad, expenditures for real estate, right of way, tunnels, bridges, and other strictly permanent improvements; and also for equipment such as locomotives and cars. The Commission had expressed the opinion that such expenditures should not be charged to a single year, but should be, so far as practicable, projected proportionally over the future. And this view Mr. Justice McKenna, speaking for the court, adopted. "It would seem," he said, "as if expenditures for additions to construction and equipment, as expenditures for original construction and equipment, should be reimbursed by all of the traffic they accommodate during the period of their duration, and that improvements that will last many years should not be charged wholly against the revenue of a single year." ⁶⁵

§ 359. New construction should be charged to capital.

The rule will be generally conceded that outright new construction should be charged to capital and should not therefore be admitted as an annual expense of operation. As Mr. Justice Carter of the Florida court recently put it in a case ⁶⁶ where the railroad, in complaining of the rates put in force by a commission, alleged that its total receipts would not now be sufficient to recoup it for its "costs of operation" and its "cost of constructing:" "The use of the words 'reasonable cost of constructing' renders the pleading very ambiguous. The reasonable cost of construction is to be considered in determining the fair value of the company's property, which is an element entering into the question of reasonableness of the rate; but the cost of construction is not to be deducted from

⁶⁵ Permanent improvements and betterments are not properly chargeable against the earnings for the year. *Louisville & N. C. & C. Rates*, 26 I. C. C. 20.

⁶⁶ *State ex rel. v. Seaboard A. L. Ry. Co.*, 48 Fla. 129, 37 So. 314. See *Erie v. Erie Gas & C. Co.*, 78 Kans. 348, 97 Pac. 468.

the earnings under the proposed rates in ascertaining if those rates are reasonable; for under such a rule the public would be compelled to pay for constructing the road without being entitled to its ownership." So in estimating the net profits of a gas company it was held that operating expenses would not include "expenditures for new wells, mains, or other permanent improvements or betterments."⁶⁷

§ 360. New construction not an operating expense.

The rule, therefore, is that outright new construction should be charged to capital, and should not, therefore, be charged in as an annual expense of operation. It is hardly more unjustifiable to charge a shipper by sea the cost of the vessel than to charge a shipper by rail in a given year the cost of a new terminal freight station. This general problem was discussed with discrimination in one of the earlier investigations by the Commission,⁶⁸ an extract from which follows: "Within recent years this railroad, in common with many others in the United States, has been extensively improved. Grades have been eliminated, curves reduced, wood bridges replaced with those of iron and stone, station buildings rebuilt, equipment of all kinds greatly added to. All this has been rendered necessary, partly by increase in traffic and partly by the desire to handle this traffic in the cheapest possible manner; and it adds very materially to the value and the earning capacity of the property. Now, in so far as these outlays are reasonably necessary to keep the property

⁶⁷ In one of the latest cases on this point in the State courts it is held that the earnings of a railroad company applied to the purchase of additional equipment, extension of its lines, and other improvements, must be regarded as a part of the net earnings, and are not properly chargeable to operating expenses. *Coal & Coke Ry. Co. v. Cenley*, 67 W. Va. 129, 67 S. E. 613.

See *Nashua & L. R. R. v. Boston & L. R. R.*, 136 U. S. 356, 34 L. ed. 363, 10 Sup. Ct. 1004.

⁶⁸ *Re Advances in Freight Rates*, 9 I. C. C. Rep. 382.

See also *The St. Paul & P. S. Accounts*, 29 I. C. C. 506, pointing out the impropriety of putting items plainly belonging to maintenance into capital, thereby making a better showing in income.

up to its former standard, or perhaps to even a higher standard of operation, they are properly a part of the operating expenses of the road, but when they add to the earning capacity of the property, and therefore to its value, they are in the nature of a permanent improvement. Assuming that the stockholder is only entitled to exact from the public a certain amount for the performance of the service, he clearly has no right to both receive that amount in dividends and add to the productive value of his property."

§ 361. Betterment out of income.

In the famous Rate Advance Cases of 1910, it was contended that rates should be enough to enable carriers not only to pay their current operating expenses, their fixed charges, a reasonable dividend, and to maintain their properties at the present state of efficiency, but also to make improvements and additions to those properties of a permanent character. Those who opposed an increase in the rates answered that improvements of this character, which add to the permanent value of the property, ought not to be paid from the current returns of the railroad, but should rather be made out of new capital. But the Commission, pointing to the recent decisions, which have not been considered, said that it would appear that both the Court and the Commission were committed to the proposition that in fixing a fair return upon railroad property, for the purpose of determining whether a given advance is reasonable, the railway ought not to treat as a part of its operating expenses the cost of permanent improvements or extensions; and this must of necessity mean that the rates should not be sufficient to allow both the payment of dividends to stockholders and interest to bondholders and an additional sum for the purpose of improving and increasing the value of the property. Theoretically, this would seem to be just. Therefore, it must be realized that generally speaking the policy of the

Commission now seems to be that each generation may well be required to bear its own burden, and the stockholder should not obtain both an adequate dividend upon his stock and an addition to the value of his property.⁶⁹

Topic C. Depreciation Requirements

§ 362. Allowance for depreciation.

In general an annual charge to meet the depreciation in the value of the plant by use seems proper. This is again something which cannot be decided by general rules as to a standard percentage, but is a matter to be determined by careful investigation into the character of the particular plant.⁷⁰ It is now seen that the question of depreciation is too difficult for offhand estimation. The courts have, as yet, usually contented themselves with saying that some fair per cent should be allowed. Undoubtedly, in the future, such expert evidence of the amount of the probable depreciation in the particular plant will be relied upon. Concrete viaducts, for example, apparently suffer a very slight depreciation, while a railroad equipment depreciates comparatively fast. The probabilities are that sufficient allowance is not being made for the physical depreciation that the usual equipment used in most public services undergoes, to say nothing of the intangible fall in the value of the present equipment due to change of fashion. A well-conducted company may indeed see to it that provision is made for the renewal of equipment which is obviously deteriorating; but few indeed are making under present conditions provision against the slow but sure depreciation of the plant as a whole. Now that it is becoming recognized in the de-

⁶⁹ *Advances in Rates, Eastern Case*, 20 I. C. C. 243.

See also the *Five Per Cent Cases of 1914*, showing that the Commission is still disinclined to permit earnings to be made to go into betterments of the property.

⁷⁰ See *Long Branch Commission v. Tinturn Manor Water Co.*, 70 N. J. Eq. 71, 62 Atl. 474.

See also *Wilkes-Barre v. Spring Brook W. Co.*, 4 Lack. L. News, 367.

cisions that such allowance is a proper operating cost, more attention will doubtless be paid to this vital matter.⁷¹

§ 363. Types of depreciation.

It is the theory of the Commission that the accounts of cost of construction should contain no factor of obsolescence; when a thing goes out of service, its value should be written off on the books. There are various types of depreciation which must be dealt with in connection with every enterprise of the character under discussion. The physical depreciation such as the wearing out of equipment is obvious.⁷² Indeed, depreciation of this sort can be almost exactly determined by those of experience in the respective lines. Then there is at the other extreme, functional depreciation due to the supersedure of equipment, which is still physically fit to do the work for which it was designed. But no one can tell with any confidence what per cent of risk there is from year to year of developments in a given art, which will make it necessary to scrap existing equipment. What it would mean to the accounts of the railroads to have to throw away passenger cars which still have perhaps twenty years of estimated life and substitute steel equipment, is something which it would be staggering for them to face. A certain obsolescence is to be looked for, however, and an allowance should be granted for making it good. But that changes are likely to affect all parts of the system equally is as improbable as that all parts of the equipment should have uniform wear.⁷³

⁷¹ See *Twitchell v. Spokane*, 55 Wash. 86, 104 Pac. 150, 24 L. R. A. (N. S.) 290.

See also *Grand Haven v. Grand Haven W. W.*, 119 Mich. 652, 78 N. W. 890.

⁷² Re *Advances in Rates, Eastern and Western Cases*, 20 I. C. C. 243, 304.

See also the inquiries made in the *New England Investigation*, 27 I. C. C. 384, as to whether proper allow-

ance for depreciation was made by the practices of these companies in substituting by purchases out of income new equipment, to take the place of those discarded.

⁷³ See the *Five Per Cent Cases* of Aug. 2 and Dec. 18, 1914.

See also the discussion in the *St. Paul & P. S. Accounts* of the impropriety of charging as depreciation of rolling stock only 1 per cent.

§ 364. Authorities refusing to allow depreciation.

There are, however, a few cases in the State courts which refuse any allowance for depreciation among the annual charges; but the matter of depreciation has been in late years so well understood that these cases have no importance to-day.⁷⁴ In one case the argument was this: "We see no reason why plaintiff, in addition to operating expenses, repairs, and other ordinary charges, should be allowed to reduce the apparent profits by deductions for a restoration or rebuilding fund. The setting aside of such a fund may be a good business policy, and, if the company sees fit to devote a portion of its profits to that purpose (though as we understand the record, no such fund has yet been created), no one can complain; but it is in no just sense a charge affecting the net earnings of the works. To hold otherwise is to say that the public must not only pay the reasonable and fair value of the services rendered, but must, in addition, pay the company the full value of its works every 40 years—the average period estimated by plaintiff—for all time to come."⁷⁵ The answer to this line of argument plainly is that those who devote their property to the service of the public should be fairly assured that not only are they to have the return on their investment which they would get elsewhere, but that their capital will at all times be secured from impairment.

§ 365. Renewal of equipment to offset depreciation.

The equipment of the road must be renewed from time to time; and an expenditure of the proper proportionate amount in each year for new equipment is a proper annual charge. So in *Milwaukee Electric Railway and Light Company v. Milwaukee*,⁷⁶ it was held proper to buy yearly

⁷⁴ *Redlands, L. & C. D. Water Co. v. Redlands*, 121 Cal. 363, 53 Pac. 791. Cedar Rapids, 118 Iowa, 234, 91 N. W. 1081.

⁷⁵ 87 Fed. 577. If a company in setting aside funds collected for de-

⁷⁶ *Cedar Rapids Water Co. v.*

and charge to annual expenses a sufficient number of cars, with motors and complete electrical equipment, to keep up the necessary standard of equipment. It may aid one to appreciate the nature of the problem and the method of its solution to cite from the expert testimony adduced in that case and adopted by the court: "In reference to the element of depreciation, the witness Beggs gives the following explanation: 'I think experience has demonstrated that the utmost life that can be expected from the best roadbed that can be laid to-day would be, at the outside, ten or twelve years, when it would have to be almost entirely renewed. The Milwaukee Company is in that condition to-day, because of the different periods that their track went down, and due to the fact that it was not all put down at one time, and it must now of necessity commence to lay about 12 miles of track annually, being about one-twelfth of its total mileage; and will be required, whether they wish to or not, to lay that amount annually hereafter, and will thereby be keeping their tracks fairly up to the standard. The same applies, I might say, to the equipment. In my estimate I have calculated that the Milwaukee Company must do this year, which, as a matter of fact, it is doing, what it did last year,—in other words, put on not less than 20 of the most modern, best-constructed equipments, thereby keeping its standard up to the minimum as it has now, of 240 equipments; because I think it is fair to assume that the average life of the double equipment, taken as a whole, will not exceed twelve years, the life of the motor being somewhat less than that, and that of the car we hope may exceed it possibly several years,—I mean the car bodies, but that, in the main, we hope that we will get an average life of twelve years out of them. So, taking 20 equipments an-

preciation beyond current replacements immediately necessary invests them in its own plant, these items, it seems, should be separately handled

and the company should not expect a profit thereon as for capital devoted to the service of the public.

nually, you would keep to your standard of 240 equipments, which is absolutely necessary to maintain—to operate—the Milwaukee Street Railway. I mean cars complete, with motors and complete electrical equipment.’” ⁷⁷

§ 366. Fund to repair depreciation.

This line of argument is well met by that advanced by Sir George Jessel, Master of the Rolls, in the case of *Davison v. Gillies*.⁷⁸ The by-laws of a tramway company required a “contingencies fund” to be set aside before the payment of dividends; and the court held this proper: “A tramway company lays down a new tramway. Of course the ordinary wear and tear of the rails and sleepers, and so on, causes a sum of money to be required from year to year in repairs. It may or may not be desirable to do the repairs all at once, but if at the end of the first year the line of tramway is still in so good a state of repair that it requires nothing to be laid out on it for repairs in that year, still, before you can ascertain the net profits, a sum of money ought to be set aside as representing the amount in which the wear and tear of the line has, I may say, so far depreciated it in value as that sum will be required for the next year or next two years. It appears to me that you can have no net profits unless this sum has been set aside. When you come to the next year, or the third or fourth year, what happens is this: As the line gets older the amount required for repairs increases. If you had done what you ought to have done, that is, set aside every year the sum necessary to make good the wear and tear in that year, then in the following years you would have a fund sufficient to meet the extra cost. Where, however, the line had worn out without a proper fund

⁷⁷ It may be said here in passing that the courts have supported the requirements of the Commission that while so much of the renewal as represents betterment may be treated

as capital added, the cost of the superseded property shall be written off as depreciation. *Kansas City So. Ry. v. United States*, 231 U. S. 423, 34 Sup. Ct. 125.

⁷⁸ 16 Ch. D. 347n.

having been provided for repairs, it was held that the whole amount necessary could not be charged to a single year, but only the proportionate amount."⁷⁹

§ 367. Capitalization of past depreciation.

That depreciation is an actual cost to be included in the annual charges of a corporation is shown in a striking manner in a late decision of the United States Supreme Court⁸⁰ to the effect that it must be provided for from year to year out of annual earnings, and cannot be ignored for a long period and then capitalized. The problem as presented to the court, and the solution of it, is so well stated in the opinion of Mr. Justice Moody that to paraphrase it would be inexcusable. "Before coming to the question of profit at all the company is entitled to earn a sufficient sum annually to provide not only for current repairs but for making good the depreciation and replacing the parts of the property when they come to the end of their life. The company is not bound to see its property gradually waste, without making provision out of earnings for its replacement. It is entitled to see that from its earnings the value of the property invested is kept unimpaired, so that at the end of any given term of years the original investment remains as it was at the beginning. It is not only the right of the company to make such a provision, but it is its duty to its bond and stockholders, and, in the case of a public service corporation at least, its plain duty to the public. If a different course were pursued the only method of providing for replacement of property which has ceased to be useful would be the investment of new capital and the issue of new bonds or stocks. This course would lead to a constantly increasing variance between present value and bond

⁷⁹ A railroad may properly accumulate funds to meet obsolescence, unless this charge is taken care of in maintenance. In *re Advances in*

Rates, Western Case, 20 I. C. C. R. 307.

⁸⁰ *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. 148.

and stock capitalization—a tendency which would inevitably lead to disaster either to the stockholders or to the public, or both. If, however, a company fails to perform this plain duty and to exact sufficient returns to keep the investment unimpaired, whether this is the result of unwarranted dividends upon over-issues of securities, or of omission to exact proper prices for the output, the fault is its own. When, therefore, a public regulation of its prices comes under question the true value of the property then employed for the purpose of earning a return cannot be enhanced by a consideration of the errors in management which have been committed in the past.”⁸¹

§ 368. Payments into sinking fund.

The suggestion is made in one case that a provision out of current earnings for a sinking fund is proper. In *Brymer v. Butler Water Company*⁸² already quoted, it was said that out of income might be set aside a “suitable sinking fund for the payment of debts.” On the other hand, in the recent case of *Houston & Texas Central Railway Company v. Storey*,⁸³ it was held that a railroad company would not be allowed to earn an amount sufficient to provide a sinking fund for the discharge of its indebtedness in addition to paying the interest thereon. It is indeed very questionable how far it is true that a public service company should be allowed to include in its annual charges a percentage sufficient to provide for the redemption of its bonds in so far as these bonds represent cost of construction.⁸⁴ To adopt such a policy would make the generation during which these bonds are being paid off buy the railroad to that extent, and yet after that it

⁸¹ Where a public service corporation raises more money in a particular year than is required for actual depreciation, it cannot carry the excess to capital for the purpose of estimating the amount on which it is entitled to pay dividends. *Louisiana Railroad*

Comm. v. Cumberland Telephone Co., 212 U. S. 414, 53 L. ed. 577, 29 Sup. Ct. 357.

⁸² 179 Pa. St. 231, 36 Atl. 249.

⁸³ 149 Fed. 499.

⁸⁴ See *Dan Diego Water Co. v. San Diego*, 118 Cal. 556, 50 Pac. 633.

would be hard to say that the next generation could demand carriage free of fixed charges. The startling truth seems to be, therefore, that a public service company should not any more expect to pay off its bonded indebtedness than to return the subscribers the subscriptions on their stock. The bonds should be refunded as they fall due, the interest remaining a fixed charge; and the stock should remain outstanding, only reasonable dividends being distributed to it. What the law secures is a return on the capital invested, not a return of it. But if the bond issue represents some expenditure not resulting in everlasting addition to the plant utilized, this may properly be provided for by an installment purchase. Such financial arrangements as equipment bonds are justifiable whereby the amount which the bond issue represents is sunk by periodical payments⁸⁵ with the same result as an installment purchase.

§ 369. Amortization of franchise rights.

Where a franchise for a limited period is granted to a public service company, it may perhaps be proper to deduct from gross income a sufficient amount to sink the value of a secured franchise which will disappear at the end of the period, since the value of the plant is annually depreciated by that amount. In *Milwaukee Electric Railway v. Milwaukee*,⁸⁶ recently cited, the court said: "There is much force in the argument of counsel that consideration should also be given to the factor of depreciation by amortization of franchises, as all the franchises in question terminate in the year 1924." In certain of the schemes now much in favor in bargaining between a municipality and a public service company, it is provided that the works shall be constructed at the expense of the public service company and operated by it as its own for a fixed period, at the end of which time the subway, or

⁸⁵ Compare *Milwaukee Electric Ry. Co. v. Milwaukee*, 87 Fed. 577. ⁸⁶ 87 Fed. 577.

whatever it may be, thus becomes the property of the municipality free of payment. It is obvious that in such a case the public service company must be allowed to sink the cost of such works from sums set aside from annual earnings by some process.

Topic D. Operations of Consolidated Properties

§ 370. Complications in case of systems.

If the business carried on by the public service company covers a large territory, the difficult question arises whether the system is to be taken as a whole or whether each locality is to be taken by itself. Additional complications are added to the problem when it is shown that the present system is the result of a consolidation, more or less integrated, of several properties; then the question becomes whether each of these original constituents is to be taken by itself in rate regulation or whether all are to be taken together as before. The consideration of this matter of the consolidation of companies belongs of course to those who are writing of the law of corporations in general. Still it may be pointed out that the present railway systems are almost invariably consolidations of various constituent companies, and that these constituent companies are almost always left in existence after the consolidation. (1) The commonest form of consolidation is perhaps by a long term lease given by the constituent road to the operating company. (2) Another equally usual is for the consolidating company to hold all or part of the stock of the constituent companies. There are, of course, two other types of combination, one less integrated than either of those just mentioned, the other more consolidated than either. (3) Thus the only bond between the railroad companies may be some traffic agreement or pooling arrangement whereby each company is left as an independent unit; (4) there may be complete consolidation, the new corporation taking over the constituent companies out-

right, these companies going out of existence.⁸⁷ It is obvious that the problem proposed for discussion in this chapter does not arise in the third and fourth types described, since, in the third, each road still remains the operating unit, while in the fourth it is plain that the new company is the sole operating unit. Whatever difficulties there may be will occur in the first and second cases. Like most questions of rate regulation, this question may arise in one of two ways: one aspect of it will be whether a railroad company operating leased lines or held lines is justified in treating its system as a whole; the other side of the question will be whether such an operating company can be required at all to consider its system as a whole in making rates.⁸⁸

§ 371. Divisions as integral parts of the whole system.

It must, however, be insisted upon as the usual solution of this problem that the railway system shall be treated as an entirety. By this conception every division is as much an integral part of the whole system as the different portions of the main line are. And the contention is that it is not proper to segregate a division and fix rates for it upon the basis of its own finances taken by themselves, although some slight scope may be given to such considerations. This general principle was well expressed, and the reasons establishing it were well set forth, in an early pro-

⁸⁷ The general rule is that systems shall be treated as units. *Union Pac. Ry. v. U. S.*, 99 U. S. 402, 25 L. ed. 274, reversing 13 Ct. of Cl. 401; *Chicago, Milwaukee & St. P. Ry. v. Tompkins*, 176 U. S. 167, 44 L. ed. 418, 20 Sup. Ct. 336, affirming 90 Fed. 363; *Minneapolis & St. L. Ry. v. Minnesota*, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. 901, affirming 80 Minn. 191, 83 N. W. 60; *Ames v. Union Pac. Ry.*, 64 Fed. 165; *Atlantic & P. Ry. v. U. S.*, 76 Fed. 186; *Milwaukee Electric Ry. Co. v. Mil-*

waukee, 87 Fed. 577; *Interstate Com. Comm. v. Louisville & N. R. R.*, 118 Fed. 613.

⁸⁸ But see *Chicago & G. T. Ry. v. Wellman*, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. 400, affirming s. c., 83 Mich. 592, 47 N. W. 489; *San Diego L. & T. Co. v. National City*, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. 804, affirming 74 Fed. 79; *Louisville & N. Ry. v. Brown*, 123 Fed. 946; *Steenerson v. Gt. N. Ry.*, 69 Minn. 353, 72 N. W. 713.

ceeding before the Commission, a significant extract from which is subjoined; speaking of an outlying division which was part of a consolidated system it was said:⁸⁹ "They are feeders to the main lines and help swell the revenues of those lines. Their profitableness is not to be measured solely by what they earn themselves, but by the increase of business and revenue they bring to the main lines. For book-keeping purposes it is proper enough to keep their accounts separately, but for their usefulness to the system of which they form a part, these accounts are slight evidence and these feeders are entitled to a much larger credit. A selected fractional part of any great railroad might be taken and a showing made by an apportionment of earnings and cost of operation and fixed charges, that it is unprofitable, but this would furnish no indication of its value and profitableness as an important part of the whole property. For purposes of rates the several auxiliary roads should not be looked upon as wholly independent lines, which may separately establish rates, looking only to a satisfactory ledger account of each separate road. These subordinate and branch roads are, for all purposes of control and operation, parts of one great system."⁹⁰

§ 372. Unprofitable portions of the line not considered.

In *Steenerson v. Great Northern Railway*⁹¹ the court considered at length the subject of unprofitable lines; and held that the profitable portions of the system could not be compelled to pay the loss on lines built through a newly and sparsely settled country. The reasoning of Mr. Jus-

⁸⁹ Per Commission in *Delaware State Grange v. New York, P. & N. Ry.*, 3 Int. Com. Rep. 554.

⁹⁰ To divide a railroad system into its constituent elements and to require that each shall show a surplus commensurate with that yielded by the business of the system as a whole in justification of a particular rate on

one commodity, is not the proper basis upon which to measure the justness of such rate. *Board of Trade of Winston-Salem v. N. & W. Ry. Co.*, 16 I. C. C. 12.

⁹¹ 79 Minn. 353, 72 N. W. 713. See also *Chicago & G. T. Ry. v. Wellman*, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. 400.

tice Canty is as follows: "If," he said, "the road was profitable a certain reasonable rate would be fixed. If then a new and unprofitable extension were made, and the accounts covered the whole system, the rates on the older portion of the road would necessarily be raised, and that portion would bear the burden of the new extension. But why should the older portion of the line bear a loss due to the mistaken management of the company? A portion of a line that is not self-supporting is not a feeder, but an incumbrance; and in determining what are reasonable rates on the rest of the line or system, any State has a right to reject such portion from the line or system. Of course, in rejecting the same all benefit to the rest of the line or system from traffic passing over such portion must also be rejected, and nothing can be allowed to the rest of the line or system on such traffic, except the operating expenses on the same, including the additional wear and tear on the rest of the road caused by such traffic. Whether this rule would apply where such a portion of a line or system ceased to be self-supporting by reason of some temporary cause, such as an unusual drought or a pestilence, we need not consider." It is perhaps fair to point out that in a later portion of the same opinion this radical court, apparently inconsistently, expressed the opinion that the whole system should be entitled to share the prosperity of each constituent part of it.⁹²

§ 373. Systems considered as wholes.

Specific illustrations of the various matters which have been discussed under this topic may help to an appreciation of the general problem. For example, in one proceeding, not long ago, it was held that cost of a bridge ought

⁹² Assigning costs of system as between several divisions thereof, dividing passenger and freight costs, separating cost of moving coal and coke as distinguished from other freight

involves a complicated division of accounts, and gives only suggestion as to actual cost. *Louisville & Nashville Railroad Coal and Coke Rates*, 26 I. C. C. 20.

not to be charged to the traffic on one section of the road.⁹³ In a later case, it was held that the fact that the line in question, although separately operated, was by stock ownership a part of the Rock Island system could not be ignored, since it afforded an opportunity for shorter hauls, and reduced operating expenses, with correspondingly increased revenue per ton-mile.⁹⁴ A road is built and operated as a whole; and local rates are not to be made altogether with reference to difficulties of each particular portion, although heavy grades and tunnels add to cost of operation.⁹⁵ The Pennsylvania lines west of Pittsburg are controlled or operated by the Pennsylvania Company, the entire stock of which is owned by the Pennsylvania Railroad; and they may have terminal arrangements which they need not share with other lines.⁹⁶ The Commission recognizes that it is just and reasonable for two or more independent roads, not parts of same system, making up a through line, to charge more for the through transportation than would be deemed reasonable for transportation, if performed wholly by a single road.⁹⁷ But where there is a system in question the profit on a particular division is not controlling, as the benefit to other portions of the system may much more than offset any loss upon the particular division.⁹⁸

§ 374. Treatment of branch lines.

The typical railroad system has trunk lines with ramifying branches. To a certain extent it is plain that the main lines with their denser traffic can be operated at less cost per ton per mile than the lateral branches. At the same

⁹³ Traffic Bureau of Merchants' Exchange of San Francisco v. S. P. Co., 19 I. C. C. 259.

⁹⁴ Kansas-Iowa Brick Rates, 28 I. C. C. 285.

⁹⁵ Traffic Bureau of Merchants' Exchange of San Francisco v. S. P. Co., 19 I. C. C. 259.

⁹⁶ 28 I. C. C. 621.

⁹⁷ Sheridan Chamber of Commerce v. C., B. & Q. R. R. Co., 26 I. C. C. 638.

⁹⁸ Louisville & N. C. & C. Rates, 26 I. C. C. 20.

time, if in a total haulage the distance upon the branch is short relatively to the distance upon the main line, it may not be unjustifiable to make the same proportionate rate for the whole distance. This was one of the many points brought out in a case before the Commission concerning rates upon milk from the tributary territories about New York brought daily to the city itself.⁹⁹ In that opinion it was said: "Ordinarily, the branch line traffic should pay more, but most of the branch lines in the nearby section are short, all of them have heretofore been given main line rates on this traffic, and some of them pass through main line stations of other roads or lead to or near the Hudson River where the traffic is affected by the competition of a line of steamers. Again, with an additional charge over main line rates from nearby branch line points, applying the same rate on main and branch lines in the distant region, which the long-distance carriers will doubtless deem necessary, would hardly be consistent. In view of these facts, we think that the group distances and rates for this traffic should be made to apply on branch as well as on main lines."¹

§ 375. Constituent roads operated under separate charters.

It is held in some cases that the fact that the constit-

⁹⁹ Milk Producers' Protective Assn. v. Delaware, L. & W. Ry., 7 I. C. C. Rep. 92.

That a given point, otherwise similarly circumstanced, is located on a branch line, while other points enjoying lower rates are located on main lines, does not create dissimilarity of circumstances. Santa Rosa Traffic Asso. v. S. P. Co., 24 I. C. C. 46.

Transportation conditions between main-line points are materially different from those prevailing at branch-line points. Board of Trade of Winston-Salem v. N. & W. Ry., 26 I. C. C. 146.

¹ See also Northwestern Ia. Grain & S. Assn. v. Chicago & N. W. Ry., 2 Int. Com. Rep. 431.

What might perhaps have been proper, as between companies operating separate and distinct short lines, may become unreasonable and unjust when both are absorbed by a large system, which serves an extensive territory. Black Mountain Coal Land Co. v. So. Ry., 15 I. C. C. 286.

The Commission is inclined to the doctrine that branch lines are operated as part of a great system. Billings Chamber of Commerce v. C., B. & Q. R. R., 19 I. C. C. 71.

uent roads still preserve their original charters and are theoretically operated under them is sufficient to justify the requirement that each shall be treated by itself in rate regulation. Thus in one case,² where the propriety of a reduction in rates ordered by the railroad commission of Florida was in question, it was shown that the Pensacola & Atlantic division of the Louisville & Nashville Railroad System was in reality a separate corporation. It was shown that the rates enforced would not give an adequate return upon the Pensacola & Atlantic Railroad itself, although the Louisville & Nashville System was shown to be profitable. Upon these facts Judge Pardee granted an injunction to prevent the enforcement of these rates, saying in substance: "The fact that a line of railroad is operated in connection with other lines owned by the same company, but under separate charters, whereby the earnings of such line are increased and its operating expenses reduced, does not prevent its being considered as a separate and independent line for the purpose of determining the reasonableness of rates thereon, fixed by the State; full consideration of the joint operation being given when the road is credited for the increased business and reduced expenses." ³

² Louisville & N. R. R. Co. v. Brown, 123 Fed. 946.

Where traffic originates upon a branch line the main line should accept for its haul from the junction point something less than it receives upon business originating at the junction point. R. R. Com'rs of Fla. v. A. C. L. R. R. Co., 28 I. C. C. 356.

The fact that a rate is made applicable to certain destinations, irrespective of whether most of them are located on branch lines, does not justify an unreasonable rate to any of the destinations involved, but the reasonableness of the rate is to be tested as a whole. League of South-

ern Idaho Commercial Clubs v. O. S. L. R. R., 18 I. C. C. 562.

³ Compare State ex rel. v. Seaboard A. L. Ry., 48 Fla. 129, 37 So. 314.

Commission rates are usually the same for all lines, both main lines and branches. It is fair that the main lines should in a degree contribute to the support of the branch line, for the branch-line business when it reaches the main line is surplus traffic from which there is a larger profit. Receivers & Shippers Ass'n of Cincinnati v. C., N. O. & T. P. Ry., 18 I. C. C. 440.

The contention that such rates should be applied as would be rea-

§ 376. Rent of leased portions.

Where a bona fide lease of one road to another is made, the operating road is entitled to include the rent of the leased road in its operating expenses. It is the annual expense of providing its appliances for carrying on its public business, and as such is a proper annual charge against gross income. The rent must be agreed upon in good faith; otherwise it would be in the power of the owners of a railroad to increase the annual charges, by successive leases, to such an extent that any rate would be reasonable. But granting the good faith of the lease and the reasonableness of the rent, it is a proper element of charge.⁴ A railroad is entitled to a fair return upon the value of the property devoted by it to the public use; but it is not entitled to have that property paid for by the public, and cannot therefore demand unreasonably high rates on the ground that one of the railroads leased by it will request permanent improvements before the expiration of the lease, the money for which must come from the income from operation.⁵

§ 377. If rental becomes unjustifiable.

According to the Minnesota doctrine by which the reproduction value of the road is the proper basis of charge, the operating line cannot charge to annual operating expenses the agreed rental of a leased line, even though it was reasonable at the time the lease was made, if it is now higher than is justified by the present rate of income and reproduction value of the leased road. "If the amount of such fixed charges exceed the amount of what is a reasonable income on the cost of reproducing the road, the patrons of the road should not be required to pay the ex-

sonable for the average railroad in that section is untenable in itself without reference to the system as a whole. *Acme Cement Plaster Company v. C. & N. W. Ry.*, 18 I. C. C. 105.

⁴ 78 Fed. 236.

⁵ *Receivers & Shippers Ass'n of Cincinnati v. C., N. O. & T. P. Ry.*, 18 I. C. C. 440.

cess.”⁶ On the other hand, if this theory should be followed, it would seem that the company should have the commercial profit of an advantageous lease. And there would be strong ground for urging that the company should have the profit of its trade:⁷ that is, if it had a lease at 4 per cent on the value of the property, it might claim the right to make 8 per cent on that value as a bonus.

⁶ *Steenerson v. Gt. Northern Ry. Co.*, 69 Minn. 353, 72 N. W. 713.

⁷ *Advance in Rates, Eastern Case*, 20 I. C. C. 243.

PART II—THE RATES IN PARTICULAR

CHAPTER IX

COST OF PARTICULAR SERVICE

- § 380. Provisions of the Act.
- 381. Various theories as to rate making.

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- 383. Distribution of the burden.
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§ 409. Cost of handling business.

410. Proportionate rates always legal.

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412. Law of decreasing costs.

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415. Cost of service estimated from special expenditures.

416. Distance as a factor.

417. Amount of traffic as a factor.

418. Costs of special service.

419. Conditions affecting transportation costs.

420. Current theories as to relative rates.

421. Conclusion as to proportionate rate.

§ 380. Provisions of the Act.

The requirements as to the reasonableness of rates in section 1 of the original act are in general terms, as has been seen, it being there stated simply that all rates must be just and reasonable, every unjust and unreasonable charge being prohibited and declared unlawful. The idea of the Act plainly is that there are standards already existing in the law by which the reasonableness of a rate charged may be determined. Vague though phrases in a statute may apparently be, yet they may well have a definite meaning in the law; and by the prevailing rule, when a given phrase has an accepted significance at common law, it should be taken in that sense in interpreting legislative enactments. In section 15, in giving the Commission power to fix maximum rates, if the existing charges are found unreasonable, the phrases used are somewhat more definite. If the Commission finds any individual or joint rates, classifications, regulations, or practices whatsoever of such carrier or carriers subject to the provisions of this Act are unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial or otherwise in violation of any of the provisions of the Act, the Commission is authorized and empowered to determine and prescribe what will be the just and reason-

able individual or joint rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged, and what individual or joint classification, regulation, or practice is just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds the same to exist. The requirement that rates must not only be reasonable, but also cannot be discriminatory is discussed at large in Chapter XIII.

§ 381. Various theories as to rate making.

Various theories as to the making of particular rates are still in vogue. Indeed, the first impression, which lasts after much reading on the topic, is that where there is not confusion upon the subject, there is disagreement. But apparently the more lawyerlike persons would base all particular rates upon the cost of the service to the company, while the more businesslike persons would make the universal test the value of the service to the patron. Opportunists would leave the making of rates to competition; paternalists would attempt to equalize the advantage of customers in making rates. But, however various they may seem, these theories as to the proper basis of rate making align themselves into two opposed groups, the legal, which gives chief place to the cost of service, and the economic, which makes the value of the service the basis.⁸ There used to be these two schools as to the whole schedule, one maintaining that the total receipts which a public service company might take was limited by law, the other one asserting that the corporations were entitled to what they could get out of the public. This matter of the whole schedule has so long been settled against economic freedom, and in favor of

⁸ The carrier is entitled to ask a fair return upon the value of property devoted to public use; the public is entitled to demand rates higher

than the services are reasonably worth. *Morgan Grain Co. v. Atlantic C. L. R. R.*, 19 I. C. C. 460.

legal restriction, that no one would reopen the controversy with any hope of success. But still at the present time, with all conceding that the gross earnings which a company may take are limited by law in any given case to a determinate amount, the economic school still persists in saying that the company can get these gross receipts by any distribution of the burden that it finds most advantageous.⁹

Topic A. Cost of Service as the Basis

§ 382. Method of estimating cost of service.

In the preceding chapters the total amount of annual receipts which the carrier is justified in taking from its whole business has been discussed. These were, in brief, all annual expenditures, including an allowance for depreciation requirements, and in addition the fair capital charges for the year, arrived at by determining what would be a reasonable return upon proper capitalization.¹⁰ A railroad must get this total from its passenger traffic and from its freight traffic. The first difficulty is to decide what proportion should be contributed by the passenger traffic and by the freight traffic respectively; then the same difficulties remain in apportioning to each item of traffic a fair share of the burden. It may be difficult, if not impossible, to apportion to each portion of the traffic its proportionate share of the fixed charges with any degree of accuracy, but at the same time, there are certain items in the cost of performing a particular service

⁹ There is no flexible limit of judgment, if all rates must be upon a level of cost, and out of every dollar paid to the carrier must come a fixed amount of return for capital invested. In re *Advances on Coal to Lake Ports*, 22 I. C. C. 604.

¹⁰ The cost of operation is an element to be considered in determining the reasonableness of a rate. In re *Advances on Live Stock*, 25 I. C. C.

63; *North Fork Cannel Coal Co. v. A. A. R. R.*, 25 I. C. C. 241; *Taylor v. N. & W. Ry.*, 25 I. C. C. 613; *Multnomah Lumber & Box Co. v. S. P. Co.*, 25 I. C. C. 123; *Union Tanning Co. v. S. Ry.*, 25 I. C. C. 112.

The Commission may not act on general impressions, but only on proof. *Railroad Commission of Mont. v. No. P. Ry.*, 26 I. C. C. 407.

which should never be left out of account by a railway management in making its rate for that service. Thus an expert railway management ought to be able to estimate with some degree of accuracy the particular expenditures involved in moving a carload from one point to another—wages, coal, oil and the like.¹¹

§ 383. Distribution of the burden.

From the point of view of the carrier, as has been seen, it is enough if the schedule as a whole yield a fair return by way of profit. To the individual shipper, however, the effect of the tariff as a whole is quite immaterial.¹² He is interested in a single rate only, that upon the goods which he is shipping; and from his point of view the important thing is that such goods shall pay no more than a reasonable part of the whole necessary return to the carrier.¹³ It is necessary, therefore, to consider next the rules for the proper distribution of the whole burden of the charge upon the individual articles carried.¹⁴ To look at the problem from another point of view, the entire schedule of rates having been established, so that the proportion is properly fixed, it will be easy to test the validity of the rates. The amount to be raised by the entire schedule of rates having been determined, according to the principles already examined, the sum of all the particular rates must equal that amount; and this sum is

¹¹ The Commission often goes into an analysis of the cost of a particular service. See for instance: *Detroit Switching Charges*, 28 I. C. C. 494; *Waverly Oil Works v. R. P. R.*, 28 I. C. C. 621; *R. R. Com'rs of Fla. v. S. Exp. Co.*, 28 I. C. C. 634; *National Syrup Co. v. C. & N. W. Ry.*, 28 I. C. C. 673.

Cost figures must be more than approximate. *Youngstown S. & T. Co. v. P. & L. E. Ry.*, 29 I. C. C. 428.

¹² Shippers are entitled to rates

which are both relatively and inherently reasonable. *Coke Producers Ass'n v. B. & O. Ry.*, 27 I. C. C. 125.

¹³ Rates should be so adjusted as to be neither too high nor too low relatively. *Lumber Rates from S. W.*, 29 I. C. C. 1.

¹⁴ All the expense going into the performing of transportation, from whatever angle it is viewed, should be taken into account in passing upon rates. *Standard Mirror Co. v. Pa. Ry.*, 27 I. C. C. 200.

determined by adding the rates received on account of the known traffic at each station.¹⁵

§ 384. Respect paid to the cost basis.

The Commission appreciates that it is not beyond the range of possibility to approximate the cost of carrying freight, as distinguished from passengers, over a certain division, or even the carrying of a certain kind of freight, when this constitutes a considerable portion of the whole traffic over such division.¹⁶ Distance and ton-mile comparisons, although often helpful in reaching a conclusion in respect to the reasonableness of rates, could not be made the sole test, so as to deny consideration to many other potent and controlling forces.¹⁷ The prevailing view seems to be that, while they are a factor in rate making, per ton-mile results are not necessarily controlling.¹⁸ Merely because the per car-mile earnings on certain traffic are higher than the average on all business does not show the particular rates are unreasonable.¹⁹ The Commission has held that improvements, which required expenditure of large sums of money, and have added to the efficiency of the service, and, therefore, to its value to the commuters, are entitled to some recognition in determining the reasonableness of increased commutation rates.²⁰ Conversely, if a carrier does not think it proper to make improvements that will reduce cost of operation, it cannot claim that it may raise rates, because cost approaches or overtakes revenue.²¹ The question of costs is never ignored in passing upon rates; and a slight increase in the cost of operation, therefore, does not justify

¹⁵ If this expense is due to costly operation of inadequate facilities it will not be allowed. *Switching at Baltimore*, 30 I. C. C. 581.

¹⁶ *In re Advances on Coal to Lake Ports*, 22 I. C. C. 604.

¹⁷ *Muskogee Traffic Bureau v. A., T. & S. F. Ry.*, 17 I. C. C. 169.

¹⁸ *Kansas-Iowa Brick Rates*, 28 I. C. C. 285.

¹⁹ *Ontario Iron Ore Co. v. N. Y. C. & H. R. R. R.*, 30 I. C. C. 566.

²⁰ *Commutation Rate Case*, 21 I. C. C. 428.

²¹ *Louisville & N. C. & C. Rates*, 26 I. C. C. 20.

an advance of 25 per cent on a low grade commodity.²² A contention of carriers that increased operation costs necessitated increased rates on certain commodities is not supported by any logical inference that it is the rates on the commodity in question which should be advanced, even if the increased cost of operation over the system as a whole is conceded.²³

§ 385. Cost of service the basic test.

More and more, the Commission has been laying emphasis upon the cost of the service, as the element to be given precedence in the determining of a rate. And it seems clear that there must finally be an intimate relation between the actual cost of transportation and the rate paid by the public.²⁴ Certainly, the adequacy of the revenue for the service performed by the carriers must take precedence over market conditions in determining the reasonableness of a rate.²⁵ In every phase of regulation, it is now recognized that in the end there must be a relation between the cost of service and charge to the public for that service. If the character of service performed is changed by public mandate so as to increase expense of performing the service, then the public must pay for its performance; it is therefore in the public interest that every transportation service should be performed in the most economical method.²⁶ Many decisions of late years have been devoted to discussion of what cost of service implies.²⁷ For it is now understood that the cost of service is necessarily to be considered in determining reasonableness of rate.²⁸ It is an element in the situation

²² *Winters Metallic Paint Co. v. C., M. & St. P. Ry.*, 18 I. C. C. 596.

²³ *Rates on Common Brick to Canada*, 26 I. C. C. 129.

²⁴ *In re Transportation of Wool, Hides, and Belts*, 23 I. C. C. 151.

²⁵ *Lindsay Bros. v. P. M. R.*, 25 I. C. C. 368.

²⁶ *Albree v. B. & M. R. R.*, 22 I. C. C. 303.

²⁷ *Morgan Grain Co. v. A. C. L. R. R.*, 19 I. C. C. 460.

²⁸ *Ohio Face Brick Mfrs. Asso. v. Adams Express Co.*, 20 I. C. C. 582.

which according to present ideas cannot be ignored.²⁹ It is typical of the doctrines now current that the proof almost invariably demanded for justifying an advance in rates is a showing that the existing rate is unremunerative.³⁰ Likewise, in deciding complaints based upon the unreasonableness of rates, the cost of service is considered in determining reasonableness of an existing rate.³¹

§ 386. Costs considered in determining comparative reasonableness.

Respective cost is also held of the greatest importance by the Commission in determining the comparative reasonableness of rates.³² It has long been laid down that rates over the same lines, between the same points, but under differing conditions, must be made with some consideration for the difference in the cost of service.³³ In making any comparisons, it will be realized in particular cases that the costs of operation are greater or less than the average. Thus it has been said that the cost of operation is somewhat more, and corresponding rates may properly be somewhat higher, in the territory west than it is east of the Missouri River.³⁴ And because of the shortness of the haul, the ton-mile receipts of New England railroads not improperly average higher than those in any other section of this country, where traffic conditions are otherwise comparable with New England.³⁵

²⁹ In re Advances on Cotton, 23 I. C. C. 404.

³⁰ In re Advances on Live Stock, 25 I. C. C. 63; In re Advances on Flaxseed, 25 I. C. C. 337; In re Advances on Hay, 25 I. C. C. 680; In re Classification of Empty Barrels, 25 I. C. C. 641; In re Advances on Hops, 25 I. C. C. 16.

³¹ Baker Commercial Club v. O. W. R. R. & N. Co., 25 I. C. C. 281; Western Classification Case, 25 I. C. C. 442; Speigle v. S. Ry. Co., 25 I. C. C. 71; In re Classification of

Empty Barrels, 25 I. C. C. 641; Coke Producers' Ass'n of Connells-ville v. B. & O. R. R., 27 I. C. C. 125; Chamber of Commerce of New York v. N. Y. C. & H. R. R. R., 27 I. C. C. 238.

³² Capital Electric Co. v. B. & O. C. T. R. R., 26 I. C. C. 472.

³³ Kindel v. N. Y., N. H. & H. R. R., 15 I. C. C. 555.

³⁴ City of Spokane v. N. P. Ry., 19 I. C. C. 162.

³⁵ The New England Investigation, 27 I. C. C. 560.

The relative lack of financial prosperity of carriers will be considered in determining the reasonableness of its rates.³⁶ The adequacy of the revenue for the service performed by the carriers must take precedence over market conditions in determining the reasonableness of a particular rate.³⁷ Wages, price of materials and supplies, greater amount hauled by trains, and density of traffic on a weak line will be considered.³⁸ And the fact that the general level of rates is probably higher in sparsely settled than in a more thickly settled territory under consideration.³⁹

§ 387. Limitation upon the law of increasing returns.

That the law of increasing returns cannot be carried too far in rate making has been pointed out many times by those who deal with this question from the legal standpoint. The general caution with which this principle is admitted may be seen by a quotation from one of the earlier opinions of the Commission: ⁴⁰ "Carriers justify this adjustment of rates by which Ash Fork is charged two and one-half times as much as is Los Angeles, although the traffic to the latter point passes through the former, by saying that water competition fixes the rate at Los Angeles, and that although the rate is unreasonably low there is some profit in the movement. The railroad itself must be constructed and maintained, with its station-houses and its operating force. These general expenses must be incurred at all events. Any traffic not otherwise coming to the road which pays something above the cost of moving, including rent of engines and cars, cost of fuel and labor, adds to the gross revenues without correspondingly increasing operating expenses. The Commission does not sanction the extent to which this principle is often pressed

³⁶ Michigan Copper & Brass Co. v. D. S. S. & A. Ry., 25 I. C. C. 357. City v. A., T. & S. F. Ry., 19 I. C. C. 218.

³⁷ Lindsay Bros. v. P. M. R. R., 25 I. C. C. 368. ³⁸ American National Live Stock Ass'n v. S. P. Co., 26 I. C. C. 37.

³⁹ Commercial Club of Salt Lake ⁴⁰ Re Proposed Advances in Freight Rates, 9 I. C. C. Rep. 382.

in the making of relative rates; certainly it does not approve the relation of rates established in the example above cited. There are many limitations to the application of the principle. Additional traffic in reality adds to those expenses which are not in theory affected. It costs more to maintain the track and keep up the operating force of a railroad when transacting a heavy than when doing a light business. The general expenses are higher. Increased tonnage speedily finds its way into the construction account; still up to a point at which traffic can be handled to advantage increase in tonnage at the same rate not only increases gross receipts proportionately, but increases net receipts in a still greater proportion."⁴¹

§ 388. Length of haul as a factor affecting a particular rate.

The first and most obvious fact which affects the rate is the length of carriage. The further goods are carried, the less, generally speaking, the charge per mile will be, since certain fixed and terminal charges must be paid once and only once no matter how long the haul. As these charges must be paid out of the rate, it is clear that the more miles the goods are carried the less the amount of the fixed charges which must be added to the rate for each mile.⁴² "It is a familiar rule in the transportation of freight by railroads, and has become axiomatic, that while the aggregate charge is continually increasing the further the freight is carried, yet the rate per ton per mile is constantly growing less all the time, unless there be exceptional conditions modifying this rule. In consequence of the existence of this rule, the increase of the aggregate charge continues to be less in proportion every hundred miles, arising out of the character and nature of the services performed and the cost of the service; and thus it

⁴¹ It is particularly true in the case of the express business that under percentage contracts, expenses can be made to increase faster than revenue whenever contracting par-

ties so desire. In re Express Rates, 28 I. C. C. 132.

⁴² *Farrar v. East Tenn., V. & G. R. R.*, 1 Int. Com. Rep. 764, 1 Int. Com. 487.

is that staple commodities and merchandise are enabled to bear the charges of transportation from and to the most distant portions of our country.”⁴³

§ 389. Modification of the principle of the length of haul.

The length of the haul is, however, only one factor in the problem; and its effect may be modified or entirely neutralized by other considerations. The natural check, so to speak, on the operation of length of haul is the difficult character of the country through which the longer haul is carried on, making operation more expensive, and thus neutralize the advantage derived from the longer haul. For this or some similar reason, the rule that the rate per ton-mile diminishes in proportion to the length of the haul must continually be modified by other circumstances of various sorts.⁴⁴ “The rule that the rate per ton per mile must be less for the greater distance is one of the tests by which the rates can be carefully scanned in themselves. It is, however, like looking at them with a microscope. It ignores all other tests except that which it alone furnishes. It ignores all surrounding circumstances and conditions and every factor of every kind and description that enters into the making of the rate, no matter how compulsory or imperious that factor may be. It serves in itself a valuable purpose, not only as a close test of what a rate really is, but also as a basis in the cases to which it can be made to justly apply as a rule; but to determine the reasonableness and justness of a rate, all surrounding circumstances and conditions, and the factors which enter

⁴³ Length of haul is plainly an important factor in establishing particular rates; in the following citations this point is emphasized: *New Orleans Cotton Exch. v. Cincinnati, N. O. & T. P. R. R.*, 1 Int. Com. 764; *Business Men's Assoc. v. Chicago & N. W. R. R.*, 2 Int. Com. 48, 2 Int. Com. Rep. 73; *Trammell v. Clyde S. S. Co.*, 4 Int. Com. 120, 5

Int. Com. 324; *Cordele Machine Shop v. Louisville & N. R. R.*, 6 Int. Com. 361; *Hilton Lumber Co. v. Wilmington & W. R. R.*, 9 Int. Com. 17.

⁴⁴ The quotation which follows is from *Bragg, Com. in Business Men's Assoc. v. Chicago, S. P., M. & O. R. R.*, 2 Int. Com. Rep. 41, 47, 2 I. C. C. Rep. 52.

into the making of the rate, if there are any that are compulsory or imperious, must be considered as well as the rights of the shipper.”⁴⁵

§ 390. Volume of traffic as a factor affecting the rate.

As the volume of traffic increases, the particular rate tends to diminish. All fixed charges, and other expenses (like station expenses, salaries, and even to a certain extent wages, which are the same whether much or little freight is carried), must be paid largely out of the freight rates, and the greater the traffic, the less each separate article must bear. It is a general principle, therefore, that a large volume of traffic tends to lower the particular rate. This fact is the basis of a theory, sometimes held, which may be described as the law of increasing returns. Traffic to a certain amount is necessary, at a given rate, to pay fixed charges and operating expenses; when that amount of traffic is obtained, further shipments will net a profit even if they pay a low rate.⁴⁶ It is, therefore, inferred that fairness permits a higher charge upon the goods which must be carried, and a lower charge to attract additional traffic, which might not otherwise be obtained. This theory, however, if pressed to its logical result, will result in unfairness. Neither the cost to the carrier, nor the value to the shipper, is affected by such considerations. The unfairness is obvious of any rule which would result in an arbitrary difference of charge to two persons requiring identical service; it would not satisfy the shipper, who had first offered goods for shipment to be told that his competitor, who had offered goods afterwards, was given a lower rate, because the law of diminishing costs justified the making of a lower rate to the second comer.⁴⁷

⁴⁵ All factors affecting a particular rate must be taken into account, not merely the length of the haul. *Re Advances on Cattle and Sheep*, 23 I. C. C. 7.

⁴⁶ Volume of traffic as affecting

rate making is mentioned oftentimes; see *National Hay Ass'n v. Lake S. & M. S. Ry.*, 9 Int. Com. 264.

⁴⁷ Amount hauled by trains and density of traffic is generally considered as affecting the cost of opera-

§ 391. Increased volume of traffic causing increase of cost.

In one case the curious position was taken that rates must be raised because the increase in traffic required a large amount of new construction. In reply to this position the Interstate Commerce Commission said:⁴⁸ "It appeared from the testimony that offerings of traffic are at present extremely large; that all lines are taxed to their utmost capacity, and that some have found it absolutely impossible to handle the amount presented. This is requiring enormous outlay in the providing of additional track facilities and the furnishing of additional equipment; and it is said that rates ought to be increased in view of this large increase in traffic, and the incident expenditures required. The idea that increased traffic should raise rates is certainly a reversion of previous notions upon that subject. The first class rate from Chicago to New York is 75 cents per hundred pounds, and the distance is one thousand miles. The corresponding rate from Chicago to the Missouri River, one-half the distance, is 80 cents. Rates generally in western territory are higher than those in trunk line territory, and it has commonly been understood that this was due to the greater density of traffic in the latter section. Without doubt this increased demand upon railways is requiring the expenditure of large amounts, but there is nothing in this which would justify an advance of rates so long as that expenditure will add proportionately to the earning capacity of the properties."⁴⁹

*Topic B. Method of Determining Particular Costs***§ 392. Proper proportion of total costs.**

In the preceding chapters the total amount of gross receipts which a public service company is justified in taking from its whole business has been discussed. These

tion. Commercial Club of Salt Rates, 9 I. C. C. Rep. 38, 427.
Lake City v. A., T. & S. F. Ry., 19
I. C. C. 218. ⁴⁸ See also Advance in Rates,
Eastern & Western Cases, 20 I. C. C.

⁴⁹ Re Proposed Advances in Freight 243, 304.

were in brief all annual expenditures, including an allowance for upkeep, and in addition the fair capital charges for the year, arrived at by determining what would be in the particular case a reasonable return upon proper capitalization.⁵⁰ As an abstract matter the fairest way to all concerned to determine the price for any particular service would seem to be to apportion ratably the total disbursements of every sort to the various items of business, and so to arrive at proportionate rates.⁵¹ Theoretically, certainly any other method is less just to all concerned. In determining thus what is a reasonable rate for a service to be rendered, it is not proper to take the road as existing and as maintained, with its track and terminal equipments, salaries and all other expenses, and to regard as the total cost of any particular service merely the increased expense necessary to add to its business the service in question. Truly, the cost of each service ought to include its fair share of the interest on investment and of the general expense; and it is necessary, therefore, to consider what rules there may be devised for proper apportionment.⁵²

§ 393. Apportionment of separable costs.

Even in a complicated business, such as railway transportation, it ought to be possible to determine the peculiar cost of a particular service with some degree of accuracy. The first difficulty that presents itself is that the ordinary railroad is engaged in at least two different businesses, the transportation of freight and the transportation of pas-

⁵⁰ In *Pennsylvania R. R. Co. v. Philadelphia County*, 220 Pa. St. 100, 68 Atl. 676, 15 L. R. A. (N. S.) 108, it was held that passenger rates could not be so reduced as to prevent the railroad company from earning a fair profit upon that branch of its business.

⁵¹ Comparisons of ton-mile revenues are frequently resorted to by the Commission. *Marian Coal Co.*

v. D., L. & W. R. R. Co., 24 I. C. C. 140.

⁵² In *Gulf, C. & S. F. R. R. Co. v. Railroad Commission (Tex.)*, 116 S. W. 795, the court held a railroad could charge for transporting lumber not merely the separable costs of such transportation, but also its proper proportion of the fixed charges of the railroad.

sengers, with their costs intermingled.⁵³ Now, many of the particular costs of moving traffic can be separated—the wages paid the train crews of freight trains from those paid to the train crews of passenger trains, and the fuel burned by freight locomotives from that burned by passenger locomotives, to take two important items. Moreover, to a certain extent the entire expense of transportation may thus be judged from the sums expended in operation.⁵⁴ When the average amount expended in moving typical quantities of a given commodity is known, a standard is established by which it may be seen whether there is not a full return to the railroad of the entire cost attributable to the transportation of these goods. It would be wrong upon any theory to ignore the cost of service, in so far as it may thus be estimated; for to serve some shippers for less than the special costs of serving them would be plainly unfair to other shippers, who would almost inevitably be called upon to make up the deficiency.⁵⁵

§ 394. Allocation of joint costs.

When the separable costs of operation have thus been distributed to the different kinds of services rendered, it will be found that from forty to sixty per cent of the total

⁵³ Ton per mile earnings alone are not an absolutely correct test of reasonableness; a combination of both ton-mile and car earnings is a more correct test than either of those factors alone. *Bahrenburg Bro. & Co. v. A. C. L. R. R. Co.*, 24 I. C. C. 560.

⁵⁴ In *Chicago, St. P., Mo. & O. Ry. Co. v. Becker*, 35 Fed. 883, a rate for switching cars fixed by a commission was enjoined, the complainant's testimony showing that the actual cost of the service, viz., wages of employees, rent of engines, and keeping the track in repair, exceeded per car by fourteen cents

the one dollar allowed in the schedule as compensation.

Train mile earnings given as a basis of determining reasonableness in *Standard Mirror Co. v. Pa. Ry.*, 27 I. C. C. 200.

⁵⁵ No complaint can be made of a charge for a particular service which not only covers the full cost of the particular service asked, but also yields a fair profit above that cost. *Southern Ry. Co. v. St. Louis H. & G. Co.*, 214 U. S. 297, 53 L. ed. 1004, 27 Sup. Ct. 678.

Car mile earnings given as a basis of determining reasonableness in *Advances on Hops*, 25 I. C. C. 16.

expenditures for which the company should be recouped have been thus accounted for, the percentage depending upon the kind of business in general and the accounting of the company in particular.⁵⁶ This determination of half of the average cost for particular services with sufficient accuracy gives to the further computation greater reliability, as it greatly diminishes the percentage of error in the total, due to the comparative inaccuracy of the other half. This other half consists of the part allocated to the particular business in question of the joint costs of operation, which consist principally of the general expenses and capital charges. Even here some distribution can be made.⁵⁷ In so far as the freight management and passenger management are divided between different officials, their salaries may be separately apportioned; and, as to a large extent freight equipment, and, to a smaller extent freight terminals, are divided, their capital charges may be divided. There remains, however, a very considerable total of joint costs inextricably combined, the salaries of the executive officers and the capital charges upon roadbed, for example. At this point, we are for the first time really driven to computation upon an artificial basis to arrive at some distribution; and obviously this is to be arrived at by striking some proportion.⁵⁸ Some students of this subject are content to rest this upon respective utilization, dividing these joint costs in the proportion (say) of freight ton-mileage to passenger mileage. But this proportion seems to throw too great a burden upon the passenger service, the receipts from the passenger train being so much less than those from the freight train. Other

⁵⁶ *Pennsylvania R. R. Co. v. State v. Atlantic C. L. Ry.*, 48 Fla. Philadelphia Co., 220 Pa. St. 100, 68 114, 37 So. 657.

Atl. 676, 15 L. R. A. (N. S.) 108. See further, *Tucker v. Missouri Pacific R. R.*, 82 Kans. 222, 108 Pac. 89.

⁵⁷ *Coal & Coke Ry. Co. v. Conley*, 67 W. Va. 129, 67 S. E. 613. See also

⁵⁸ On this point see *Re Advances on Coal to Lake Ports*, 22 I. C. C. 604.

Train mile earnings as the basis of the comparison. *Duluth Log Rates*, 29 I. C. C. 420.

persons maintain that the volume of business done should determine the proportion, dividing these joint costs (say) in the proportion of freight receipts to passenger receipts. But this proportion, in turn, seems to throw too great a burden upon the freight traffic, the passenger obviously receiving more service than its proportion of the total receipts.⁵⁹

§ 395. Basis of the distribution.

In a late case⁶⁰ these principles are thus discussed by Judge Hook. "From the very nature of the case, therefore, some rule must be adopted for charging to each of them their fair and equitable proportion of the common expense. Of necessity it must proceed upon average conditions commonly known or shown to exist, and it argues nothing to say that it does not fully apply to this or that exceptional instance. A general rule based on experienced observation is fair, and what is lost by its application in one place is doubtless gained in another, and an equitable equilibrium maintained. Of those suggested the revenue basis appears to be much more uniform in its adaptability and much less subject to substantial objection. It has been frequently employed. It is the one to which the mind naturally turns in every problem involving the charging of common expense to different departments of a business. When a general or common expense cannot be located what is more obviously reasonable than to say in the first place the different branches or departments shall bear it according to the value of their products of their gross earnings, and then make due allowance for exceptional conditions if any are perceived? That seems at the start to satisfy the mind intent on equity. It is a working basis for the distribution of all expense incident to railroad

⁵⁹ Rate per ton per mile to be considered as relative test in rate making. *National Hay Asso. v. M. C. R. R.*, 19 I. C. C. 34.

What are reasonable passenger

rates: See *Trier v. C., St. P., M. & O. Ry.*, 30 I. C. C. 352.

⁶⁰ *Missouri, K. & T. Ry. Co. v. Love*, 177 Fed. 493.

business among its revenue yielding operations of every character." ⁶¹

§ 396. Basis of the proportion.

With due deference to those who have been worried in choosing between these two bases of casting proportions—the revenue basis and the operating basis each of which it is admitted has its error—the writer would suggest that by a compound proportion, utilizing both proportions, the respective errors in the single proportions would be largely offset, and an entirely defensible result would be reached.⁶² One significant comparison to ascertain whether relative injustice is being done one traffic as against another, is through the earnings per car.⁶³ But, where the commodity moves in trainloads, the earnings per train-mile furnish the best criterion.⁶⁴ And in general it may be said that neither train mileage nor car earnings is sufficient in itself; a combination of both ton-mile and car earnings is more apt to show reasonableness than either of those factors alone.⁶⁵ Whatever factors, or combination of factors, are employed in determining what should be the proper average rate per ton per mile for the traffic in question, it is obvious that the carriers are entitled to a higher revenue per ton per mile than this rate on a haul which is shorter than the average.⁶⁶ And in arriving at the average cost for a given commodity for a given transit the fairest basis will be that taking into account all factors in traffic movement.⁶⁷

⁶¹ Citing *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. ed. 819; *Chicago, M. & St. P. R. Co. v. Tompkins*, 176 U. S. 167, 20 Sup. Ct. 336, 44 L. ed. 417; *Northern Pacific v. Keyes*, 91 Fed. 47; *In re Arkansas R. R. Rates*, 163 Fed. 141; *St. Louis & S. F. R. Co. v. Hadley*, 168 Fed. 317.

⁶² *Marion Coal Co. v. D., L. & W. R. R.*, 24 I. C. C. 140.

⁶³ *Ozark Fruit Growers' Ass'n v.*

St. Louis & S. F. R. R., 16 I. C. C. 106; see also *Merchants' & Manufacturers' Ass'n v. A. C. L. R. R.*, 22 I. C. C. R. 467.

⁶⁴ *Traffic Bureau of Nashville v. Louisville & N. R. R.*, 28 I. C. C. 533.

⁶⁵ *Wisconsin Steel Co. v. P. & L. E. R. R.*, 27 I. C. C. 152.

⁶⁶ *Wharton Steel Co. v. D., L. & W. R. R.*, 25 I. C. C. 303.

⁶⁷ *Pabst Brewing Co. v. C., M. & St. P. Ry.*, 17 I. C. C. 359.

§ 397. Average rate per unit of service.

In dealing with a multiplicity of rates for particular services, the computations described in this topic are next carried to the determination of the average cost per unit of service, which may be used thereafter as a standard for testing the charge for any particular service.⁶⁸ Of any given company it may be said that it is entitled to take as gross receipts from its whole business a certain sum, determined by adding together its operating expenses, including therewith all proper maintenance charges, and its fixed charges, that is, a fair return upon a reasonable capitalization. This total amount divided by the total service gives the average cost per unit. In testing freight rates, the standard to be determined is the ton-mile cost. If the sum of the whole amount of freight carried be one hundred million ton-miles, and the gross revenue required from freight be one million dollars, the average rate of freight will be one cent per ton-mile. If there were no other factors in the problem, therefore, a fair proportionate rate would be the ton-mile average charge. Because, however, of other factors, which cause a difference between commodities with respect to the fair charge for carrying them, a uniform ton-mile rate applied to all cases would not result in reasonable rates.⁶⁹

§ 398. Recognition of the ton-mile cost basis.

Although generally abhorrent to economists, the ton-mile cost basis is well recognized by judges to-day as the first test to be employed in determining the reasonableness of particular rates. In a recent case⁷⁰ in the United

⁶⁸ Cost figures are of great value. *Pittsburgh Vein Operators of Ohio v. P. Co.*, 24 I. C. C. 280.

There is no exact standard by which the reasonableness of a rate can be measured. *National Wool Growers' Ass'n v. O. S. L. R. R. Co.*, 25 I. C. C. 675.

⁶⁹ Ton-mile cost as measure of rate.

National Lumber Exporters' Ass'n v. St. L., I. M. & S. Ry., 28 I. C. C. 215.

An increase made solely for purpose of obtaining more revenue is held by the Commission not to be justified. *Collingwood Brick Co. v. P. M. R. R.*, 26 I. C. C. 572.

⁷⁰ *Atlantic C. L. Ry. Co. v. Florida*,

States Supreme Court, where the issue was whether a certain rate upon phosphate fixed by a commission was fair to the railroad affected, Mr. Justice Brewer, speaking for the court said: "And here we face the situation: The order of the commission was not operative upon all local rates but only fixed the rates on a single article, to wit, phosphate. There is no evidence of the amount of phosphates carried locally; neither is it shown how much a change in the rate of carrying them will affect the income, nor how much the rate fixed by railroads for carrying phosphates has been changed by the order of the commission. There is testimony tending to show the gross income from all local freights and the value of the railroad property, and also certain difficulties in the way of transporting phosphates owing to the lack of facilities at the terminals. But there is nothing from which we can determine the cost of such transportation. We are aware of the difficulty which attends proof of the cost of transporting a single article, and in order to determine the reasonableness of a rate prescribed it may be sometimes necessary to accept as a basis the average rate of all transportation per ton per mile. We shall not attempt to indicate to what extent or in what cases the inquiry must be special and limited. It is enough for the present to hold that there is in the record nothing from which a reasonable deduction can be made as to the cost of transportation, the amount of phosphates transported, or the effect which the rate established by the commission will have upon the income. Under these circumstances it is impossible to hold that there was error in the conclusions reached by the Supreme Court of the State of Florida, and its judgment is affirmed."⁷¹

203 U. S. 256, 51 L. ed. 174, 27 Sup. Ct. 108.

⁷¹ See also *Wood v. Vandalia R. R.*, 231 U. S. 1, 34 Sup. Ct. 7, holding that it is not enough to set forth the capital values and the net earnings,

even if all this may have been done convincingly: before the operating ratios and ton-mile costs established from this proof can be available, it must be shown that the particular traffic under consideration costs

§ 399. Ton-mile cost basis not oppressive.

At all events it may be said that governmental regulation based upon the ton-mile basis is not oppressive. This is shown sufficiently in another case⁷² involving a similar issue decided by the same Justice on the same day. "With reference to the second of these cases the order made by the railroad commission is said by the plaintiff in error to be an 'irregular, unjust and unreliable method of rate fixing,' and this upon the theory that the order makes the rate per mile the same for any distance, whether one mile or a hundred miles. It appears that 16.43 per cent of all the local freight business of the company in Florida comes from the carrying of phosphates, and reference is made to several cases in which the courts have noticed the fact that the cost of moving local freight is greater than that of moving through freight, and the reasons for the difference. But evidently counsel misinterprets the order of the railroad commission. It does not fix the rate at one cent per ton per mile. It simply provided that it shall not exceed one cent per ton per mile, prescribes a maximum which may be reduced by the railroad company, and if distance demands a reduction the company may and doubtless will make it. In addition it must be borne in mind that it is to be presumed that the railroad commission acted with full knowledge of the situation; that phosphates were in Florida possibly carried a long distance, the place of mining being far from the place of actual use or preparation for use. Further, when we turn to the report of the railroad company (which of course is evidence against it) we find that the company's average freight receipt per ton per mile in the State of Florida was $8\frac{5}{8}$ mills; so that the rate authorized for phosphates was nearly two mills per ton larger than such average. Under these circumstances it is impossible to say that there

more or less than the average, as the case may be.

Florida, 203 U. S. 261, 51 L. ed. 175, 27 Sup. Ct. 109.

⁷² Seaboard Air Line Ry. Co. v.

was error in the conclusions of the Supreme Court of the State, and its judgments are affirmed." ⁷³

§ 400. Argument for permitting disproportionate rates.

So far as there is as yet actual law upon this problem of the revision of particular rates, the outcome still hangs in the balance where it is not unlikely it will long remain. It must be conceded that at first sight the weight of authority would seem to be against one who is claiming that the particular rates in a schedule should not be unreasonably disproportionate. But upon examination this weight of authority will be found only for a limited proposition. It is true that by what is still the weight of authority the imposition of a rate by legislation, which fixes so disproportionately low a rate for a particular service as to make that service admittedly unprofitable will nevertheless not be held to be unconstitutional, if from its total receipts the company in question will get a fair return on its proper capital above operating expenses and reasonable charges. The Supreme Court of the United States still holds to the doctrine first clearly announced in *Minneapolis & St. Louis Railroad Company v. Minnesota* ⁷⁴ where Mr. Justice Brown in justifying an order of the State commission so reducing the rate on coal that its

⁷³ See also *Missouri Pacific Ry. v. Tucker*, 230 U. S. 340, 57 L. ed. 1507, 33 Sup. Ct. 985, holding that a railroad can insist upon having a fair return for services rendered, and that to compel it to serve for rates which are unremunerative is virtually confiscation.

⁷⁴ 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. 901. The court had already committed itself to this doctrine in *St. Louis & S. F. R. R. Co. v. Gill*, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. 484; see further to the same effect: *Interstate Consolidated St. Ry. Co. v. Massachu-*

setts, 207 U. S. 79, 52 L. ed. 111, 28 Sup. Ct. 26; *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. 192; *Southern R. R. Co. v. McNeill*, 155 Fed. 756; *Central of Ga. Ry. Co. v. McLendon*, 157 Fed. 974; *In re Arkansas R. R. Rates*, 168 Fed. 720. But see *Lake Shore & M. S. Ry. Co. v. Smith*, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. 565.

See also *Southern Ry. Co. v. Atlanta Stove Works*, 128 Ga. 207, 57 S. E. 429; *State ex rel. v. Northern Pacific Ry. Co. (N. D.)*, 120 N. W. 869, 25 L. R. A. (N. S.) 1001.

transportation would be at a loss said: "Notwithstanding the evidence of the defendant that if the rates upon all merchandise were fixed at the amount imposed by the commission upon coal in carload lots, the road would not pay its operating expenses, it may well be that the existing rates upon other merchandise, which are not disturbed by the commission, may be sufficient to earn a large profit to the company, though it may earn little or nothing upon coal in carload lots."⁷⁵

§ 401. Authorities opposed to disproportion.

It should be noted, however, that there has been vigorous protest of late years against this proposition, even as it has been limited. In this connection the recent case of the Pennsylvania Railroad Company v. Philadelphia County⁷⁶ deserves full consideration as the latest expression of the modern tendency to look into the different departments of the business in their relation to one another. In that case there was a bill in equity to restrain the enforcement of the Pennsylvania statute imposing a two-cent passenger rate. It was urged in defense of the legislation that, although it might leave no profit to the railroad in question upon its passenger traffic, the gross receipts of that railroad would, notwithstanding this, be sufficient to pay a fair profit upon its whole capital. But

⁷⁵ Note also the language of the Commission in at least these two cases: It is a well-established and generally recognized rule that if additional business can be taken on at rates which will contribute little in addition to actual out-of-pocket expense, the carrier will be advantaged to that extent and all its patrons will be benefited to the extent to which such traffic contributed to the net revenue. *Boileau v. P. & L. E. R. R. Co.*, 24 I. C. C. 129. A violation of section 3 cannot be predicated upon a difference in rates

on non-competing articles, unless the rate on the favored article is so low as to be unremunerative and fail to carry its share of the burden of producing revenue. *Bartlesville Salvage Co. v. M., K. & T. Ry. Co.*, 25 I. C. C. 672.

⁷⁶ 220 Pa. St. 100, 68 Atl. 676, 15 L. R. A. (N. S.) 108. See further to the same effect: *Gulf, C. & S. F. R. R. Co. v. Railroad Commission (Tex.)*, 116 S. W. 795; *Coal & Coke Ry. Co. v. Conley*, 82 W. Va. 129, 67 S. E. 613.

the Pennsylvania Supreme Court held the legislation unconstitutional upon this showing, Chief Justice Mitchell saying: "True business principles require that the passenger and freight traffic not only may, but should be separately considered. The intelligent business of the world is done in that way. Every merchant and manufacturer examines and ascertains the unprofitable branches of his business with a view to reducing or cutting them off entirely, and there is no reason why a railroad or other corporation should not be permitted to do the same thing as long as its substantial corporate duties under its franchise are performed. While the public has certain rights which in the case of conflict must prevail, yet it must not be forgotten that even so-called public service corporations are private property organized and conducted for private corporate profit. And unless necessary for the fulfillment of their corporate duties they should not be required to do any part of their business in an unbusinesslike way with a resulting loss. If part is unprofitable it is neither good business nor justice to make it more so because the loss can be offset by the profit on the rest. To concede that principle would, as the court below indicated, permit the legislature to compel the carriage of passengers practically for nothing though the inexorable result would be that freight must pay inequitable rates that passenger travel may be cheap." ⁷⁷

Topic C. Factors Modifying Average Cost

§ 402. Cost of service insufficient in itself.

To be entirely fair, the cost of service is not always the

⁷⁷ Note also the following rulings of the Commission: Where proposed rates will yield less than the average cost of operation per ton per mile on all traffic, advances held to be justified. Rates on Sand to Houston, Tex., 26 I. C. C. 677. Carriers may not haul a particular class of traffic or traffic for a particular community at less than the cost of the service and

recoup themselves from the charges levied against other traffic. In re Rates for Single Packages, 22 I. C. C. 328. Large revenue from other traffic is no reason for reducing the rate on pulpwood. Curry & W. Co. v. D. I. & R. Ry., 30 I. C. C. 1. Rates must not be too high or too low relatively. Lumber Rates from S. W., 29 I. C. C. 1.

decisive factor in determining a railroad rate, even if it could in all cases be fairly approximated. The ton-mile average cost in railroad transportation will always be found to be much modified by other factors in actual application.⁷⁸ For, in the first place, it must always be impossible to arrive at the exact cost of a particular carriage. No goods, as a practical matter, are carried by themselves under such circumstances that an exact computation can be made of the cost of carriage. In the second place, even if such a computation were possible, it would not necessarily be fair to make a shipper pay the exact cost of carriage of each shipment.⁷⁹ To do so would make the freight vary according to the circumstances of each journey; no man could know what he must pay for any particular shipment, and for similar carriages of the same article two shippers would pay very different charges. Practical convenience requires that the charge shall be uniform for a certain article carried over a certain route, although the exact cost of carriage may at one time be very much greater than at another.⁸⁰ The exact cost of carriage, therefore, or such approximation to it as may be possible, can never be used as the sole factor in a particular rate. But while the cost of carriage cannot be used by itself to determine a particular rate, neither should it ever be neglected. Considered along with other factors, it must have a strong influence in raising or lowering the particular rate.⁸¹

⁷⁸ Severe operating conditions caused by grades and curves are to be considered in determining the reasonableness of a rate. Consolidated Fuel Co. v. A., T. & S. F. Ry., 24 I. C. C. 213; Arlington Heights Fruit Exchange v. S. P. Co., 24 I. C. C. 671.

⁷⁹ The severity of operating conditions, caused by grades and curves, considered in determining the reasonableness of a rate. See Taylor v.

N. & W. Ry. Co., 25 I. C. C. 613; North Fork Cannel Coal Co. v. A. A. R. R., 25 I. C. C. 241; Multnomah Lumber & Box Co. v. S. P. Co., 25 I. C. C. 123; Union Tanning Co. v. S. Ry. Co., 25 I. C. C. 112.

⁸⁰ Cost of service is but one of the elements to be considered in determining the reasonableness of a rate. Commercial Club of Superior v. G. N. Ry. Co., 24 I. C. C. 96.

⁸¹ Cost is an important element in

§ 403. Special conditions affecting cost.

There may be special circumstances connected with a particular transaction which increase or decrease the cost of service; and the effect of such circumstances on the rate must be considered. For instance, the expense of constructing a mountain branch may be very much greater than that of building the main line; or the population served by the company may in places be so sparse as to make the cost of operation very great in proportion to the service demanded. All these circumstances may properly affect the rate charged in those portions of the territory served by the company; yet it appears unjust to place the whole burden upon such territory, thus accentuate its poverty, and place another handicap upon it in the effort to become prosperous. There are many things besides the mere mileage run which must be considered in fixing the rates. A uniform mileage rate imposed upon all railroads would be in reality unequal and unjust. As Mr. Justice Morse said in *Wellman v. Chicago & Grand Trunk Railway*:⁸² "If no classification can be made, and the maximum rate must be fixed the same for all, then the law is admitted to operate unequally and unjustly, because some companies are to less expense than others in the same length of road by reason of the nature of the country through which they run; some have costly terminal facilities, and some have not; some owe large amounts, and some do not; and some do a large amount of business, and some do not."⁸³

§ 404. Amount of service asked as a factor.

As the amount of service asked at a particular time increases, the cost thereof tends in normal cases to fall be-

determining reasonableness of freight rates, but is not controlling. *Louisville & N. C. & C. Rates*, 26 I. C. C. 20.

⁸² 83 Mich. 592, 47 N. W. 489.

⁸³ Natural operating obstacles modify ton-mile averages. *Grand Junction M. & F. Co. v. C. & M. Ry.*, 16 I. C. C. 452.

low the average.⁸⁴ This is a familiar rule in the transportation of freight by railroads; and it has become axiomatic that while the aggregate charge is continually increasing the further the freight is carried, yet the rate per ton per mile is constantly growing less all the time. In consequence of the existence of this rule the increase of the aggregate charge continues to be less in proportion every hundred miles after the first, arising out of the character and nature of the service performed and the cost of service; and thus it is that staple commodities and merchandise are enabled to bear the charges of transportation from and to the most distant portions of the country.⁸⁵ The reason for this rule is that the cost of railway transportation is made up of the expense of the two terminals and the intermediate haul, and the terminal expenses are the same whether the haul be long or short. A few miles, or even a considerable number of miles, of additional haul may in some instances of long distance transportation be practically of very little importance, and the aggregate rate, therefore, may be very little affected by the additional mileage.

§ 405. Effect of low average haul.

A high average ton-mile revenue of a railroad may be due to short hauls, and the net earnings of such a system may be most unsatisfactory. It has been repeatedly shown that traffic low in ton-mile earnings may, because of its

⁸⁴ A dissimilarity in the density of traffic and of other conditions renders unfair a comparison of rates from central freight association territory to western trunk line territory with rates from St. Louis to Texas. *Even & Howard Fire Brick Co. v. St. L., I. M. & S. Ry.*, 25 I. C. C. 141.

Minimum revenue per car in this territory compared with rates in other territories. *Furniture Rates in the Northwest*, 26 I. C. C. 655.

⁸⁵ All rules, regulations and charges

affecting ultimate cost of transportation must be made with a reasonable regard for nature of commodity transported. *Sunderland Bros. Co. v. St. L. & S. F. R. R.*, 23 I. C. C. 259.

Noted that cement carried is 2.06 per cent of the entire traffic, whereas charges thereon amount to only 1.53 per cent of total revenue. *Little Rock Chamber of Commerce v. St. L., I. M. & S. Ry.*, 26 I. C. C. 341.

farther carriage and greater density, be the most remunerative.⁸⁶ An accurate presentation of per ton-mile yield to be significant must include a statement which will show the actual hauls and the average length of the hauls.⁸⁷ The principle that carriers are entitled to a somewhat higher revenue per ton per mile on short than on long hauls, is generally conceded.⁸⁸ Relative differences in rates based upon distance should increase as the distance to points of destination increases.⁸⁹ A decrease in the mileage divisor makes the cost per ton for a short haul relatively greater than for a long haul.⁹⁰ Distance is always a factor in determining reasonableness of rate, but distance alone is not controlling.⁹¹ Under prevailing local rates, and the expenses incident to short-haul business, short-haul traffic brings in but small revenue.⁹² The fundamental principle is that the ton per mile revenue decreases as distance increases.⁹³ Plainly therefore the length of haul should not multiply the charge.⁹⁴ The average haul is, therefore, given its due weight when put in evidence.⁹⁵ But per car earnings, with distance considered, are much more reliable than ton-mile statistics.⁹⁶ But it is well established that rates are not made with respect to distance alone.⁹⁷ Differences in cost of service to the carrier, value of service to the shipper and questions of competition in the selling market should be taken into consideration.⁹⁸

⁸⁶ Traffic Bureau of Nashville v. L. & N. R. R., 28 I. C. C. 533.

⁸⁷ Lumber Rates Texas, etc., to Oklahoma and Missouri, 28 I. C. C. 471.

⁸⁸ Wharton Steel Co. v. D., L. & W. R. R., 25 I. C. C. 303.

⁸⁹ Sheridan Ch. of Com. v. C., B. & Q. Ry., 26 I. C. C. 638.

⁹⁰ Taylor v. N. & W. Ry., 25 I. C. C. 613.

⁹¹ Corporation Commission of N. C. v. N. & W. Ry., 19 I. C. C. 303.

⁹² Mayor & Council of Douglas v. A. B. & A. R. R., 28 I. C. C. 445.

⁹³ Anadrako Cotton Oil Co. v. A., T. & S. F. Ry., 20 I. C. C. 43.

⁹⁴ Switching Charges at Sheffield, Minn., 26 I. C. C. 475.

⁹⁵ Pittsburg Steel Co. v. L. S. & M. S. Ry., 27 I. C. C. 173.

⁹⁶ Memphis Freight Bureau v. I. C. R. R., 27 I. C. C. 507.

⁹⁷ Traffic Bureau of Nashville v. L. & N. R. R., 28 I. C. C. 533.

⁹⁸ Black Mountain Coal Land Co. v. So. Ry., 15 I. C. C. 286.

§ 406. Local business peculiarly expensive.

Sometimes the cost of a particular service is peculiarly expensive. Thus local shipments are more expensive to handle in proportion to the mileage than long distance shipments, and a greater proportionate charge is therefore justified. "The operating expenses of a railroad consist of two principal items: (1) cost of maintenance of plant; (2) cost of conducting transportation. The former item is constant, and can justly be divided between the different kinds of traffic in proportion to their volume. As to the second item, however, such a division cannot properly be made; for it is agreed, by all who have had occasion to consider the subject, railroad commissioners as well as railroad officials, that the cost of conducting transportation is, relative to income, much higher for local business than for the general business of a road. The causes of this added cost are chiefly three: (1) the shortness of the haul; (2) the lightness of the train loads; (3) expense of billing and handling the traffic." ⁹⁹ But because a greater charge may be made on local than on through business, it by no means follows that all the charge of maintaining a station can be laid upon the business done at that station. If, for instance, a small amount of business is done at a station the rates cannot be made much greater at that station than at a neighboring way station, where three or four times as much business is done. Some particular losses are inseparable from the conduct of a general public service.¹

⁹⁹ Northern Pacific Ry. Co. v. Keyes, 91 Fed. 47. See also Chicago, M. & St. P. Ry. Co. v. Tompkins, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. 336.

Under prevailing local rates and the expenses incident to short-haul business brings in but small revenue. Mayor & Council of Douglas v. A. B. & A. R. R. Co., 28 I. C. C. 445.

¹ In Missouri, K. & T. Ry. Co. v.

Love, 177 Fed. 493, the court considered elaborately the greater cost of local business in comparison with through business. See also St. Louis & S. F. Ry. Co. v. Hadley, 168 Fed. 317.

Conditions being materially different, rates to main-line points cannot be made the standard of reasonableness of rates to branch-line points. Board of Trade of

§ 407. Circumstances of particular service.

The view of the Commission seems to be that the rate per ton-mile rule brings rates down to the narrowest point of scrutiny, and for that purpose is valuable; but it excludes consideration of other circumstances and conditions which enter into the making of rates, no matter how compulsory or imperious they may be, and it cannot, therefore, be accepted as controlling in determining the reasonableness of rates.² As the Commission has pointed out, the reasonableness of a rate must of necessity depend upon the conditions surrounding the traffic at the time it moves. The length of the haul, the competition to be met, the cost of the service, the value of the service, the density or volume of the tonnage, as well as the general transportation conditions then existing are factors that have a more or less definite relation to the rate that a carrier may reasonably demand for a transportation service. And these factors, except possibly the length of the haul, the grades, and other transportation conditions are in their nature neither permanent nor fixed; but necessarily change with the general economic panorama. No presumption of law, therefore, can arise against an advanced rate simply because a lower rate previously existed.³

§ 408. Divisions in sparsely populated territory.

It is clear that where a division of a railroad runs through a sparsely populated country, so that the amount

Winston-Salem v. N. & W. Ry. Co., 26 I. C. C. 146.

² Cedar Hill Coal & Coke Co. v. C. & S. Ry., 16 I. C. C. 387.

TRANSPORTATION CONDITIONS found to be materially different upon the Winston-Salem division than those prevailing between main-line points or between points on the system where main-line conditions control. Board of Trade of Winston-Salem v. N. & W. Ry. Co., 26 I. C. C. 146.

³ Memphis Cotton Oil Co. v. I. C. R. R. Co., 17 I. C. C. 313.

TERMINAL FACILITIES, when extensive and costly, are entitled to weight in consideration of reasonableness of rate; and where commodity is of high weight and bulk such facilities broadly distributed are of value to the consignees in that amount of cartage is not nearly so great as if deliveries were confined to one or two points. Maritime Exchange v. P. R. R., 21 I. C. C. 81.

of business done upon it is comparatively small, and the net earnings are therefore much below the average of the whole road, the charges may be greater than the charges on the other parts of the road. As Mr. Justice Brewer said in the *Nebraska Maximum Freight Rates Case*:⁴ "It may be true, as testified by some of the witnesses, that the existing local rates in Nebraska are forty per cent higher than similar rates in the State of Iowa. But it is also true that the mileage earnings in Iowa are greater than in Nebraska. In Iowa there are 230 people to each mile of railroad, while in Nebraska there are but 190; and, as a general rule, the more people there are the more business there is. Hence, a mere difference between the rates in two States is of comparatively little significance." This same line of argument was pithily put by Mr. Justice Canty in *Steenerson v. Great Northern Railway*,⁵ when he asked, "Why should the people of Minnesota and Eastern Dakota be made to pay an income on this idle railroad property further west?"

§ 409. Cost of handling business.

Costs do not determine rates; yet cost is generally an important element in arriving at a judgment with respect to a rate. What weight shall be given to that element, as compared with all the other elements entering into a particular rate, is a matter to be decided in each individual case.⁶ The Commission will not compel the establishment of rates solely according to mileage; the public benefits, the greater volume of business of carriers warranting lower rates to all, the force of competition and many other potent

⁴ 64 Fed. 165, 188.

BRANCH LINES: Higher rates may be made to points on a branch line, with proper limitations, than to main-line points. *Idaho Commercial Clubs v. O. S. L. R. R.*, 18 I. C. C. 562.

⁵ 69 Minn. 353, 72 N. W. 713.

LOCAL RATES are to be made with respect to difficulties of each portion of the road. *Traffic Bureau of Merchants' Exchange of San Francisco v. S. P. Co.*, 19 I. C. C. 259.

⁶ *Boileau v. P. & L. E. R. R.*, 22 I. C. C. 640.

considerations may far outweigh a claim of right founded only on geographic location.⁷ Ton-mile statistics, reflecting as they do neither car loading, train tonnage, nor car or train mileage, are far from being infallible guides in fixing freight rates.⁸ A road is built and operated as a whole and local rates are not to be made with reference to difficulties of each particular portion.⁹ The drift toward the doctrine that rates should be proportioned according to differences truly existing in the cost of rendering the service, is altogether in accordance with the tendency of the modern law of public service against all discriminatory practices. Indeed, any method of fixing rates which results in disproportionate treatment to different customers asking somewhat different services would seem to be against that fundamental principle of equality which of late years has been held to be violated by discriminatory treatment of different patrons asking substantially similar services.

§ 410. Proportionate rates always legal.

The rate maker may always, with the approbation of the law, work out a schedule of rates in which the respective rates are based upon their proportional cost of the whole service rendered. Not only would all courts undoubtedly agree that legislation forbidding disproportionality in rates is constitutional,¹⁰ but it is doubtless law that a public service company may so arrange its schedule as to make each rate yield a reasonable profit for each service above the fair cost, without any question as to the legality of such a course.¹¹ It is, therefore, well within limits to say, in summarizing what has gone before, that although

⁷ *Fort Dodge Commercial Club v. I. C. R. R.*, 16 I. C. C. 572.

⁸ *Traffic Bureau of Nashville v. L. & N. R. R.*, 28 I. C. C. 533.

⁹ *Traffic Bureau of Merchants' Exchange of San Francisco v. S. P. Co.*, 19 I. C. C. 259.

¹⁰ *Seaboard Air Line Ry. Co. v. Florida*, 203 U. S. 261, 51 L. ed. 175, 27 Sup. Ct. 109, and cases cited.

¹¹ *Pennsylvania R. R. Co. v. Philadelphia County*, 220 Pa. St. 100, 68 Atl. 676, 15 L. R. A. (N. S.) 108, and cases cited.

the rate making party is as yet by the weight of authority not held to act illegally in imposing a schedule where the particular rates are out of proportion,¹² it is unanimously agreed that, if the policy of proportional distribution of the real costs is adopted by the rate making body, no objection can be made on any grounds whatsoever.¹³ The suggestion is sometimes made that a distinction is to be drawn between keeping the different classes of charges proportionate and making the particular rates proportionate. Except for the inherent difficulties of pursuing the inquiry further, the writer perceives no difference in principle between the two; and he has no reason to believe that the distinction has foundation in law.

§ 411. Relative reasonableness of rates.

The cases which come to the Supreme Court if complaint is made of illegal action by State commissions arise under the Fourteenth Amendment, and are therefore devoted to the constitutional limitations upon commission action. On the other hand, the questions which come to the Supreme Court where the power of the Interstate Commerce Commission to act has been attacked have usually been questions involving the statutory limitations of the Interstate Commerce Act. These obviously are different problems; and, as will appear later, what is not confiscation of the property of a company, under the guaranties of the Constitution, may be a course which, by fair interpretation of statutory authority under the Act, it would not be reasonable to require. Such a case is *Minneapolis & St. Louis Railway v. Minnesota*,¹⁴ where as has already been seen it was held that a State might without violating the Fourteenth Amendment reduce rates on a particular commodity below what was profitable, so long as the rates as

¹² *Willcox et al. v. Consolidated Gas Co.*, 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. 192, and cases cited.

¹³ *Interstate Com. Comm. v. Western A. R. R. Co.*, 88 Fed. 186, and cases cited.

¹⁴ 186 U. S. 257, 22 Sup. Ct. 901.

a whole still produced a return which was adequate. The power of the Commission to alter rates depends altogether upon the fact of their unreasonableness, and in the absence of evidence to that effect the Commission has no authority.¹⁵ All this may not have been so plain in regard to this amendment at the outset as it has become subsequently in the light of the decisions interpreting it. But by the time that the case of *Interstate Commerce Commission v. Stickney*¹⁶ was decided it had become clear enough that a carrier under section 15 of the Act as amended was entitled to a finding by the Commission that the particular charge complained of was unreasonable before a change could be required.¹⁷ Moreover, as that case held, a charge for a service which did not give the carrier more than a fair profit for performing it, was not unreasonable. For the Commission to attempt to fix a new rate at the out of pocket cost in place of the existing rate which included a profit upon the service performed, was therefore altogether beyond the statutory limitations upon the power of the Commission. Probably, however, this would not be an invasion of constitutional rights, since the profits of the company taken as a whole apparently remained sufficient.

Topic D. Proper Distribution of Costs

§ 412. Law of decreasing costs.

It has been pointed out, however, in all discussions of the railroad problem by economists that the fixed expenses, which constitute so considerable a proportion of the disbursements by a railroad, are to a very large extent independent of the amount of its traffic carried. Therefore, additional business will always be done at a decreasing relative cost. The net income rises as the business expands,

¹⁵ *Interstate Commerce Commission v. Union Pacific R. R.*, 212 U. S. 541, 32 Sup. Ct. 108.

¹⁶ 215 U. S. 98, 30 Sup. Ct. 66.

¹⁷ *Southern Pacific Ry. v. Interstate Commerce Commission*, 219 U. S. 433, 31 Sup. Ct. 288.

and the law of increasing returns is again demonstrated. This may be shown in the simple formula of W. M. Acworth, the leading English authority on railway economics.¹⁸ "Expenses increase as traffic increases, but by no means in direct proportion. Certain expenses—for instance maintenance of works—hardly increase at all; others—for instance, terminal handling of goods at big stations, where the staff can be normally kept fully employed—increase almost as fast as the traffic. The bulk of the expense is intermediate between these two extremes. On the whole, a common and probably roughly accurate estimate is to say that half the total expenses is fixed; half varies with the traffic. That is to say, if it costs x to deal with 1,000,000 units of traffic, 5,000,000 units will cost not $5x$, but $\frac{1}{2}x + (\frac{1}{2}x \times 5) = 3x$. Therefore the heavier the traffic the lower (profits remaining equal) need be the rate." This is no more than a statement of a commonly accepted theory, that unit cost decreases with increase in the units produced.¹⁹

§ 413. Cost of service for different systems.

It must be obvious from all that has been said, that cost of service is a relative matter, different for different railroad systems. Upon some systems there will be grades, upon others none. Some are great systems with all the economies of large businesses, while others may conduct small systems through sparsely settled territory. To quote a specific instance from an opinion of the Commission: ²⁰ "Tested by these rules, a rate may be a very reasonable and just rate on one railroad and not reasonable and just on another. For example, a rate that would be reasonable and just on the New York Central & Hudson River Railroad may be so low that it would force the Minneapolis & St. Louis Railway into bankruptcy in less than

¹⁸ Elements of Railway Economics, p. 50.

¹⁹ Ton per mile rates and revenues should decrease as haul increases.

Gottroff Bros. Co. v. G. & W. R. R. Co., 23 I. C. C. 38.

²⁰ New Orleans Cotton Exchange v. Illinois Cent. R. R., 2 Int. Com. Rep. 777, 3 I. C. C. Rep. 534.

thirty days; and a rate that might be reasonable and just on the Minneapolis & St. Louis Railway might be so high that if attempted to be enforced on the New York Central & Hudson River Railroad for thirty days it would practically destroy the business of the latter. This diversity is most observable in the different portions of the country, as, for instance, between lines of railroad in the Southern States or the States of the far west, on the one hand, and the railroad lines of the Middle and Eastern States on the other. Where, however, railroad lines reach the same common points, are located in the same territory, and compete with each other, as well as with other lines for the business of that territory, their rates are, in general much the same, and this is one of the necessities of the situation. Even among the rail carriers where there may be occasional differences in rates that will be found substantially justified by the different circumstances and conditions under which the lines are operated.” ²¹

§ 414. Cost of service for different parts of the same system.

The point that the cost of service may be different for different parts of the same system was insisted upon in *Interstate Commerce Commission v. Lehigh Valley Railroad Company*.²² It appeared in that case that the Interstate Commerce Commission, upon complaint of a shipper, had adjudged a certain rate upon coal unreasonable. The Commission based its finding upon its deductions from the annual report of the defendant company that the average cost of carrying a ton of coal from the Lehigh anthracite regions to Perth Amboy was 85 cents. Judge Acheson held that this was an inadequate basis to justify the finding that the particular rate in question was unreasonable; he said: “If the explanation thus given by the

²¹ Cost per unit of freight moved decreases with volume. *Louisville & Nashville Railroad Coal and Coke Rates*, 26 I. C. C. 20.

²² 74 Fed. 784, appeal withdrawn, 82 Fed. 302, 27 C. C. A. 681.

counsel for the Commission is a correct statement of the method pursued by the Commission in making its estimate of 85 cents, then, in our judgment, that method is without justification. For, having adopted an estimated average rate of revenue, namely, \$1.495, from each ton of coal carried over the 149 miles from the Lehigh and Mahanoy regions to Perth Amboy, the Commission assumed that the expenses of the transportation of coal over this particular branch of the defendant's railroad system was necessarily only the average cost of the carriage of all coal upon the defendant's entire system. The assumption which thus underlies the Commission's estimate is unwarrantable. Merely because the cost of carriage of all coal upon the defendant's entire railroad system from all points of shipment to all destinations was 56 per cent of the gross receipts from all coal is no reason for concluding that upon a particular line or part of the system the cost of carriage bears the same ratio to the coal receipts from that particular line or part." ²³

§ 415. Cost of service estimated from special expenditures.

To a certain extent the entire expense of transporting may be judged from the sums expended in moving the goods. When the average amounts expended in moving quantities of a given commodity is known, a standard is established by which it may be seen whether there is not a full return to the railroad of the entire cost attributable to the transportation of these goods. This method of demonstration was used with good effect in one report by the Interstate Commerce Commission upon the contention of the trunk lines that it would be necessary for them to raise the rate on grain, which was 17 1-2 cents from Chicago to New York, as that rate was unremunerative. The quotation which follows will show how the

²³ Difference in transportation conditions in different territories considered in determining the propriety

of rate comparisons. *Even & Howard Fire Brick Co. v. St. L., I. M. & S. Ry.*, 25 I. C. C. 141.

Commission came to its conclusion that the rate yielded a fair return to the carrier: ²⁴ "As bearing upon this, certain testimony given in the present investigation by the traffic manager of the Lake Shore & Michigan Southern Railway as to the cost of moving grain over his line is interesting and instructive. He testified that the standard train upon the Lake Shore road consists of 50 cars, containing 80,000 pounds per car; that the time occupied in hauling this train from Chicago to Buffalo would be 36 hours, and that the cost of movement, including labor of trainmen, coal consumed, oil and waste, rent of engine and of cars, would approximate \$260. He gave the items making up this total, which need not be repeated here. The traffic manager of the New York Central Company was unable to give the corresponding figures from Buffalo to New York, but it appeared that a standard locomotive would haul, with the assistance of a helper at one or two points, this train, or an even heavier train, from Buffalo to New York in approximately the same time and at approximately the same expense, the distance being about 100 miles less. The total train expense, therefore, of moving this traffic from Chicago to New York would be \$520, while the total revenue derived from it, at 17 1-2 cents per 100 pounds, would be \$7,000." ²⁵

§ 416. Distance as a factor.

As a rule, in the transportation of freight by railroads, while the aggregate charge is continually increasing the farther the freight is carried, the rate per ton-mile is constantly growing less all the time, making the aggregate charge less in proportion every hundred miles after the first, arising out of the character and nature of the service performed, and the cost of the service; and thus staple

²⁴ Prouty, Commissioner, in *Re Advances in Freight Rates*, 9 I. C. C. Rep. 382.

²⁵ While it is a fundamental maxim that rate per ton-mile shall

decrease as distance increases, to disregard rule is not of necessity a discrimination. *Boston Chamber of Commerce v. A., T. & S. F. Ry. Co.*, 28 I. C. C. 230.

commodities and merchandise are enabled to bear the charges of this mode of transportation from and to the most distant portions of the country.²⁶ The Act to Regulate Commerce, so far from throwing hampering restrictions or obstacles in the way of the operation of this salutary rule, gives it all the benefit and aid of its sanction and safeguards by providing that the carrier shall be entitled to receive a reasonable compensation for the service performed upon open published rates, against which no competitor can take advantage by allowing shippers secret rebates and drawbacks in order to get the business.²⁷ In the nature of things rates on long hauls usually are, and as a rule should be, lower in proportion to distance than local rates on short hauls of the same commodity. For this reason the rate per ton-mile is not controlling, and cannot be enforced upon carriers by the Commission; but distance is of great importance in fixing rates, and must be considered.²⁸

§ 417. Amount of traffic as a factor.

As it is cheaper to move goods in bulk rather than in small lots, a smaller relative rate is permissible upon carload lots than on less than carload lots; but this difference must be no more than is reasonable.²⁹ Before allowing a carload rating for a carload shipment, a carrier is allowed to require that goods shall be loaded at one time

²⁶ *New York Produce Exchange v. Baltimore & O. R. R.*, 7 I. C. C. Rep. 612; *La Crosse, M. & J. Union v. Chicago, M. & S. P. Ry.*, 2 Int. Com. Rep. 277.

²⁷ *Farrar v. East Tenn. & G. Ry.*, 1 Int. Com. Rep. 703, 1 I. C. C. 480; *Crews v. Richmond & D. R. R.*, 1 Int. Com. Rep. 703, I. C. C. 401.

²⁸ *Freight Bureau v. Cincinnati, N. O. & T. P. Ry.*, 7 I. C. C. Rep. 180; and see *Milwaukee Chamber of*

Commerce v. Chicago, M. & St. P. Ry., 7 I. C. C. 481.

There can be no rule or process whereby definite absolute maximum limit of reasonableness of rate can be fixed with certainty of a demonstration. *Anardarko Cotton Oil Co. v. A., T. & S. F. Ry.*, 20 I. C. C. R. 43.

²⁹ *Duncan v. Atchison, T. & S. F. R. R.*, 4 Int. Com. Rep. 385, 6 I. C. C. 85; *Business Men's League v. Atchison, T. & S. F. R. R.*, 9 I. C. C. Rep. 318.

and place, that but a single bill of lading shall be allowed, and that the shipment shall be by one consignor to one consignee.³⁰ So, while a carrier should receive a greater compensation in the aggregate for hauling a carload of large tonnage than one of less tonnage, other things being equal, as a general rule, the rate per hundredweight should be less in the former than in the latter case.³¹ The large bulk in which a commodity moves by railroad will for the same reason justify a lower rate.³² Nevertheless, though carload rates will be justified, it was once held that a carrier cannot be forced to grant lower rates for a carload,³³ or for a larger carload than the ordinary load.³⁴ Density of traffic as element to be considered in determining reasonableness of rate.³⁵ And it is fundamental also that a rate should decrease as density of traffic increases.³⁶ For example, salt is very desirable traffic from a transportation standpoint. It loads heavily, is not liable to loss or damage in transit, can be handled at the convenience of the carrier, and affords a uniform business—all these considerations call for a low rate of transportation.³⁷ Ordinarily the same rate is applied to all lumber, being a bulk freight, without reference to its value or condition; and, as a matter of fact, this rate frequently includes not only manufactured lumber, but articles made from it, like doors, sash, blinds, etc.³⁸

§ 418. Costs of special service.

A higher rate will be justified where special service is

³⁰ *Buckeye Buggy Co. v. Cleveland, C., C. & St. L. Ry.*, 9 I. C. C. Rep. 620; *C. S. Bell Co. v. Baltimore & O. S. Ry.*, 9 I. C. C. Rep. 632.

³¹ *Murphy v. Wabash R. R.*, 3 Int. Com. Rep. 725, 5 I. C. C. 122.

³² *Re Rates and Charges on Food Products*, 3 Int. Com. Rep. 93, 4 I. C. C. 48.

³³ *Railroad Commrs. v. Weld*, 96 Tex. 394, 73 S. W. 529.

³⁴ *Planter's Compress Co. v. Cleveland, C., C. & St. L. Ry.*, 11 I. C. C. Rep. 382.

³⁵ *Railroad Commission of Tex. v. A., T. & S. F. Ry.*, 20 I. C. C. R. 463.

³⁶ *In re Advances in Rates, Eastern Case*, 20 I. C. C. R. 243.

³⁷ *Railroad Commission of Kansas v. A., T. & S. F. Ry.*, 22 I. C. C. 407.

³⁸ *Oregon & W. Lumber Mfrs. Ass'n v. S. P. Ry.*, 21 I. C. C. 389.

required, such as rapid transit, special cars, and speedy delivery for perishable freight.³⁹ This increased rate must, nevertheless, remain reasonable.⁴⁰ The amount of the reasonable rate may also be affected by other special circumstances. Thus in arriving at what is a just and reasonable rate, on freight transported by a carrier on a short local line having but a small volume of business, where the cost of transportation is exceptionally great, arising from steep grades, sparse population, and light traffic, these are circumstances and conditions of controlling weight in the making of the rates, and cannot be overlooked when a question of their reasonableness is involved.⁴¹ In the same way a higher rate is justified where the carrier goes to expense in collecting his freight.⁴² Charges may properly be made somewhat higher for transportation of show cases in crates than in boxes; show cases ordinarily are composed largely of glass or woods of value, and the risk of damage is greater when shipped in crates than in boxes.⁴³ In making rates on explosives, carriers should vary rates according to risk attendant upon transportation of each particular kind.⁴⁴ Likewise, empty-car movement, and meager unbound traffic, are to be considered in rate making on a class of traffic.⁴⁵

§ 419. Conditions affecting transportation costs.

A lower rate may be made when, by the arrangement

³⁹ *Delaware State Grange v. N. Y. P. & N. R. R.*, 3 Int. Com. Rep. 554, 4 I. C. C. 588; *Loud v. South Carolina Ry.*, 4 Int. Com. Rep. 205, 5 I. C. C. 529; *Newland v. Northern Pacific R. R.*, 4 Int. Com. Rep. 474, 6 I. C. C. Rep. 131.

⁴⁰ *Board of Railroad Comrs. v. Florence Ry.*, 8 I. C. C. Rep. 1; *Rates on Cantaloupes*, 26 I. C. C. 101.

⁴¹ *Rice v. Western N. Y. & P. R. R.*, 2 Int. Com. Rep. 298, 2 I. C. C. 389; *Savannah Bureau of Freight &*

Transp. v. C. & S. Ry., 7 I. C. C. Rep. 601; *Georgia Peach Growers' Ass'n v. Atlantic C. L. Ry.*, 10 I. C. C. Rep. 255.

⁴² *Howell v. New York, L. E. & W. R. R.*, 2 Int. Com. Rep. 162, 2 I. C. C. 272.

⁴³ *Wadell Show Case & Cabinet Co. v. M. C. R. R. Co.*, 22 I. C. C. R. 106.

⁴⁴ *Blumenstein v. P. & R. Ry.*, 21 I. C. C. R. 90.

⁴⁵ *Davis Bros. Lumber Co., Ltd., v. C., R. I. & P. Co.*, 257.

for shipment, liability to a certain extent is released.⁴⁶ And when ticket is bought before taking the train a lower rate may be made than if fare is paid to the conductor.⁴⁷ So a different rate may be made for summer and winter, if traffic conditions differ with the seasons.⁴⁸ When a practice had existed on the part of certain carriers of live cattle to make a carload rate irrespective of weight, leaving the shipper to load into the car as many cattle as he pleased and was able to put into it, and the carriers substituted for this practice the rule that while naming a car-lot rate they prescribed a minimum weight for a carload, and then charged by the hundred pounds in proportion to the car-lot rate for any excess over the minimum, it was held that this rule was not unlawful.⁴⁹ A carrier, which had not provided track scales at stations, prescribed a rule or regulation forbidding shippers to load grain in cars beyond a specified weight above the market capacity under a so-called "penalty" of increased rates on the excess weight; this was held not unreasonable provided the increase in charges for excessive weight is not unreasonable, as the margin between such maximum and the carrier's minimum carload weight for grain is so wide that shippers may, without scales, readily comply with both rules.⁵⁰ But unreasonable conditions may not be imposed. A shipper should not be subjected to unnecessary restrictions as to the kind of case or package he should use.⁵¹ To make a different rate on coal loaded by tipple than for coal loaded from teams is not reasonable.⁵² And a differ-

⁴⁶ *Duncan v. Atchison, T. & S. F. Ry.*, 4 Int. Com. Rep. 385, 6 I. C. C. Rep. 85.

⁴⁷ *Cist v. Michigan Central R. R.*, 10 I. C. C. Rep. 217.

⁴⁸ *Interstate Commerce Comm. v. Louisville & N. R. R.*, 5 I. C. C. Rep. 656.

⁴⁹ *Leonard v. Chicago & A. R. R.*, 2 Int. Com. Rep. 599, 3 I. C. C. 241.

⁵⁰ *Suffern v. Indiana, D. & W. Ry.*, 7 I. C. C. 255, and see *Phelps v. Texas & P. Ry.*, 4 Int. Com. Rep. 363, 6 I. C. C. Rep. 36; *Rice v. Cincinnati, W. & B. R. R.*, 3 Int. Com. Rep. 841, 5 I. C. C. 193.

⁵¹ *Rhode Island Egg & B. Co. v. Lake Shore & M. S. R. R.*, 4 Int. Com. Rep. 512, 6 I. C. C. Rep. 176.

⁵² *Glade Coal Co. v. Baltimore & O. R. R.*, 10 I. C. C. 226.

ence in the rate based on the ultimate destination of the goods is not justified.⁵³ When a conditional rate is justified, the difference must be no more than is reasonable under the circumstances.⁵⁴ And if a difference in rate is authorized, it is only while the circumstances justifying it exist.⁵⁵

§ 420. Current theories as to relative rates.

All the principles governing the fixing of rates which have ever been suggested may be seen in brief compass in an elaborate opinion of Judge Bethea:⁵⁶ "There are a great many factors and circumstances to be considered in fixing a rate."⁵⁷ Among other things: (1) The value of the service to the shipper, including the value of the goods and the profit he could make out of them by shipment. This is considered an ideal method, when not interfered with by competition or other factors. It includes the theory so strenuously contended for by petitioners, the commission, and its attorneys, of making the finished product carry a higher rate than the raw material. This method is considered practical, and is based on an idea similar to taxation.⁵⁸ (2) The cost of service to the carrier would be an ideal theory, but is not practical. Such cost can be reached approximately, but not accurately enough to make this factor controlling. It is worthy of consideration, however.⁵⁹ (3) Weight, bulk, and convenience of transportation. (4) The amount of the product or the commodity

⁵³ *Hope Cotton Oil Co. v. Texas & P. Ry.*, 10 I. C. C. Rep. 696.

⁵⁴ *New Orleans Cotton Exch. v. Illinois Central R. R.*, 2 Int. Com. Rep. 777, 3 I. C. C. 534.

⁵⁵ *Re Relative Tank & Barrel Rates*, 2 Int. Com. Rep. 245, 2 I. C. C. 365.

⁵⁶ *Interstate Commerce Commission v. Chicago Gt. Western R. R.*, 141 Fed. 1003.

⁵⁷ Citing *Noyes, Am. R. R. Rates*, 61, 85-109.

⁵⁸ Citing *Interstate Commerce Commission v. B. & O. Ry.*, 43 Fed. 37.

⁵⁹ Citing *Western Union Tel. Co. v. Call Publishing Co.*, 181 U. S. 92, 21 Sup. Ct. 561, 45 L. ed. 765; *Interstate Commerce Commission v. Detroit, Grand Haven & Milwaukee R. R.*, 167 U. S. 633, 17 Sup. Ct. 986, 42 L. ed. 306, etc.

in the hands of a few persons to ship or compete for, recognizing the principle of selling cheaper at wholesale than at retail.⁶⁰ (5) General public good, including good to the shipper, the railroad company and the different localities.⁶¹ (6) Competition, which the authorities, as well as the experts, in their testimony in these cases, recognize as a very important factor.⁶² None of the above factors alone are considered necessarily controlling by the authorities. Neither are they all controlling as a matter of law. It is a question of fact to be decided by the proper tribunal in each case as to what is controlling.”⁶³

§ 421. Conclusion as to proportionate rate.

As a result of these considerations, the hypothesis may be drawn that a rate, duly proportioned to what is truly the cost of service, should be established for each article of traffic. In all cases, where other factors in the situation are not such as to imperatively demand recognition, this rate should be fixed according to the share of the entire burden of charge which ought reasonably to be borne by that particular article. In determining the reasonable share of the burden to be borne by an article, various considerations must be weighed, and the rate when finally established will be determined as a result of all such considerations. It must be clear, therefore, that the establishment of the particular rate is not, like the establishment of the general schedule of charges, a matter which can be settled altogether by a mathematical formula. There are

⁶⁰ Citing *Int. Com. Comm. v. B. & O. Ry.*, 145 U. S. 263, 12 Sup. Ct. 844, 36 L. ed. 699.

⁶¹ Citing *Int. Com. Comm. v. B. & O. Ry.*, 145 U. S. 263, 12 Sup. Ct. 844, 36 L. ed. 699.

⁶² Citing *Phipps v. London & Northwestern Ry.*, 2 Q. B. D. 229.

⁶³ Citing *Int. Com. Comm. v. Alabama Midland Ry. Co.*, 168 U. S. 144, 18 Sup. Ct. 45, 42 L. ed. 414; *East Tennessee, Virginia & Georgia Railway Co. v. Int. Com. Comm.*, 181 U. S. 1, 21 Sup. Ct. 516, 45 L. ed. 719, *Texas & Pac. Ry. Co. v. Int. Com. Comm.*, 162 U. S. 197, 16 Sup. Ct. 606, 40 L. ed. 940; *Int. Com. Comm. v. Louisville & Nashville R. R. Co.*, 190 U. S. 273, 23 Sup. Ct. 687, 47 L. ed. 1047, etc.

too many economic factors operating in bringing about a particular rate for that to be possible really. The division of rates among the particular commodities involves judgment and experience; it is not an exact division, but only the closest possible approximation to fairness.

CHAPTER X

VALUE OF SERVICE RECEIVED

- § 430. Provisions of the Act.
- 431. Rates based upon value.

Topic A. Value as the Basis

- § 432. What the traffic will bear.
- 433. Essential defects in the principle.
- 434. Legal limitations peculiarly necessary.
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- 436. Value of the goods.
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Topic B. Rates Reasonable Per Se

- § 442. Carrier entitled to reasonable compensation.
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- § 452. Rates may be made to meet competition.
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Topic D. Rates Designed to Equalize Advantages

- § 462. Operation of the principle of equalization.
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- 464. Rates made from a commercial standpoint.
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- 479. No equalization of patrons.
- 470. Equalization of advantage as a factor.
- 471. Passenger fares slightly affected by this principle.

§ 430. Provisions of the Act.

The provisions already discussed, to the effect that rates must be reasonable, are supplemented by the requirements, more fully considered later, that rates shall not be disproportionate. As has been seen, these two requirements are combined in section 15 establishing the jurisdiction of the Commission to see to it that charges shall not be unjust or unreasonable, or unfair or unjustly discriminatory or unduly preferential or prejudicial. In section 3, as was provided in the original Act, it is said that it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. And to section 4 a paragraph was added recently to the effect that whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates, unless after hearing by the Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition. What is undue pref-

§§ 431, 432] RAILROAD RATE REGULATION

erence under these provisions of the Act is discussed at large in Chapter XIV.

§ 431. Rates based upon value.

It is sometimes suggested that the value of the service to the customer is "what the traffic will bear," that is, what he will be willing to pay rather than lack the carrier's service. In one sense, the service is worth what one will pay for it. This is the rule which always appeals to the company as fair and just. And indeed this consideration has some place in every philosophy of rate making; although it is submitted that it is a dangerous principle which may often operate to the disadvantage of the public unless it is much modified in many cases. So necessary is some such principle felt to be by traffic managers that it will always be found to be continually employed in rate making; and this is one of the prime causes for the necessity of governmental revision, for the protection of the public, of the rates established by the carriers. The real truth of this matter seems to be that the policy of charging what will produce the largest volume of business is fundamental in private businesses, but often opposed to the law governing public businesses.

Topic A. Value as the Basis

§ 432. What the traffic will bear.

It is often urged in discussion of the railway rate problem that it is justifiable to make rates according to what the traffic will bear. This again is a factor in the situation undoubtedly; for the management in order to get business enough to carry on its service with economy and profit must make some concessions to the low grade commodities which it will inevitably recoup from the high grade freight. And yet this is clearly a principle which can only be justified under strict limitations. These are well discussed by the Commission in the quotation which

follows:⁶⁴ "There was the further suggestion running through the testimony of all the witnesses that, after all, a rate was purely a traffic question which could be properly estimated only by traffic and commercial conditions. The real question was said to be, Will the traffic bear these higher rates? One witness distinctly affirmed that no rate was unreasonable under which traffic would move freely, and that since it was for the interest of the carriers to move traffic, there was no probability that these rates were unreasonable, or that unreasonable rates would ever be imposed. This idea contains a half truth. With respect to some kinds of traffic the statement is correct. It is for the interest of the railway to create business upon its line, and in the legitimate pursuit of that interest it fosters industries by the making of rates which would not otherwise be put in force."⁶⁵

§ 433. Essential defects in the principle.

Any considerable concession to the principle of charging what the traffic will bear is dangerous. The carrier is acting primarily for the benefit, not for the exploitation of the public. To allow a carrier, for instance, to charge what the traffic will bear is to foster a continual increase of railroad rates. The problem was concisely and unanswerably stated and discussed by Mr. District Judge Speer in the case of *Tift v. Southern Railway*.⁶⁶ In this

⁶⁴ The quotation which follows is from *Re Proposed Freight Rates*, 9 I. C. C. Rep. 382.

"The richest example" of the charging-what-traffic-will-bear theory. In *re Express Rates*, 24 I. C. C. 380.

⁶⁵ To base rates upon shipper's ability to pay, is to base rates upon cost of production rather than cost of carriage; this is in effect a usurpation of power of regulation of industries and commerce by the railroads. In *re Advances in Rates*, *Western Case*, 20 I. C. C. 307.

In all classifications consideration must be given to what may be termed public policy, the advantage to the community of having some kinds of freight carried at a less rate than other kinds; this is the true meaning of the phrase "what the traffic will bear." In *re Advances on Coal to Lake Ports*, 22 I. C. C. R. 604.

⁶⁶ 138 Fed. 753; see language in *Tift v. Southern Ry.*, 10 I. C. C. 548.

Limitations to rule that a carrier should not charge more than an article can bear, discussed. *Bartles-*

case the Southeastern Freight Association, an association including the defendant railways, had raised the freights on lumber from Georgia to the Northwest. At first shipments almost ceased; but with a revival of business they began again. Builders felt themselves obliged to have it, whatever the price, and whatever the rate, and large shipments were made on the advanced rates. The fact of the large shipments was relied upon to show that the new rates were not unduly high, but the court said that it was in no sense related to the reasonableness or unreasonableness of the rate. "Indeed, to concede the principle for the fixation of rates upon which the railroads through the medium of the Southeastern Freight Association have acted in this case would concede their power to levy for no better service augmentation of tolls for every increase of profit in every line of endeavor won by the enterprise, sagacity, and industry of the American people. It is superfluous to add that a government of law, and not of men, will never tolerate such domination and control of the trade, manufactures, and commerce of the American people." ⁶⁷

§ 434. Legal limitations peculiarly necessary.

It is urged sometimes that this principle of charging what the traffic will bear contains its own safeguards; for, if more is charged than the value of the service to the shipper, shipments will cease; and traffic managers, realizing this, as they are in close touch with the situation, will never intentionally or permanently charge more than the transportation is worth to the goods carried. The answer to this seems to be that in many instances shippers will

ville Salvage Co. v. M., K. & T. Ry.,
25 I. C. C. 672.

⁶⁷ The Commission is not ready to accept theory that rates may lawfully be increased as long as traffic moves freely. Commercial Club

of Omaha v. A. & S. R. Ry., 19 I. C. C. 419.

The mere fact that traffic will bear the imposition does not justify unreasonable rate. Railroad Commission of Nev. v. S. P. Co., 19 I. C. C. 238.

pay for the transportation of goods more than the true value of the transportation, if that is necessary in order to get their goods to market. They will shift this undue burden upon the consumer if they can, and if not they will be obliged to forego a part, or in extreme cases all, of their legitimate profit in order to get their products sold at all. While the rule that a carrier should not charge more than the traffic can bear has some weight with a carrier in the making of its rates, it does not impose upon a carrier any duty to carry traffic at a loss.⁶⁸ Whatever might be the policy in this regard, to adjust rates to correspondingly fluctuate with the values of products moving under them is impossible.⁶⁹ Nothing is better established than that the Commission may not make the needs of the shipper the basis of reasonable rates.⁷⁰ A shipper is entitled to the transportation that he desires on rates that are reasonable, not when tested by the fact that the carrier may earn larger revenues by hauling his wares, but on rates that are reasonable in accordance with the usual and ordinary tests that are applied to rates.⁷¹

§ 435. Value of service to shipper.

The value of the service to the shipper should be considered, which includes a consideration of the profit that the shipper can make by having his goods transported to their destination.⁷² This was once said by District Judge Bethea to be "an ideal method;" "practical, and is based on an idea similar to taxation."⁷³ Nevertheless, the correctness of this view may be doubted; at all events, the Commission has rejected any theory to the

⁶⁸ *Bartlesville Salvage Co. v. M., K. & T. Ry.*, 25 I. C. C. 672.

⁶⁹ *Ponchatoula Farmers' Ass'n v. I. C. R. R.*, 19 I. C. C. 513.

⁷⁰ *Superior Commercial Club v. G. N. Ry.*, 25 I. C. C. 342.

⁷¹ *Chamber of Commerce of Mil-*

waukee v. C., R. I. & P. Ry., 15 I. C. C. 460.

⁷² *Re Rates and Charges on Food Products*, 3 Int. Com. Rep. 93, 4 I. C. C. 48.

⁷³ *Interstate Commerce Commission v. Chicago G. W. Ry.*, 141 Fed. 1003.

effect that rates may be increased by successive advances, so long as traffic moves freely.⁷⁴ But, on the other hand, the Commission has said repeatedly that consideration must be given to the value of the service in determining reasonableness of rates.⁷⁵ It is tolerably well settled by authority that value is nothing but a factor to be considered, and by no means a controlling factor in the determination of the reasonableness of a rate.⁷⁶ The determination of a reasonable rate rests in the service performed, the risk involved, the value of the article, and the degree of care required to be exercised; but the use to which articles are put, without any difference between them and dissimilarity in conditions under which the transportation is performed, may not lawfully be made the basis for a difference in charge.⁷⁷ It follows that carriers are not justified in raising rates on the ground that the industries served have greatly prospered under the old rates and can bear the advance; but the lawfulness of an advance in rates must be determined by their reasonableness.⁷⁸

§ 436. Value of the goods.

The value of the goods carried is obviously to be considered to a certain extent in determining the reasonableness of the rate, since the greater the value the greater the risk.⁷⁹ But the value of the goods cannot be made

⁷⁴ Commercial Club of Omaha v. A. & S. Ry., 19 I. C. C. 419.

⁷⁵ Coke Producers Ass'n of Connellsville v. B. & O. R. R., 27 I. C. C. 125.

⁷⁶ See generally, Cincinnati Freight Bureau v. Cincinnati, N. O. & T. P. Ry., 4 Int. Com. Rep. 592, 6 I. C. C. Rep. 195; F. Schumacher Milling Co. v. Chicago, R. I. & P. Ry., 6 I. C. C. Rep. 61; In re Proposed Advances in Freight Rates, 9 I. C. C. Rep. 382; Central Yellow Pine Assoc. v. Illinois Central R. R., 10 I. C.

C. Rep. 505; Tift v. Southern Ry., 10 I. C. C. Rep. 548.

⁷⁷ Davis v. West Jersey Express Co., 16 I. C. C. 214.

⁷⁸ Oregon & Washington Lumber Mfrs. v. V. P. R. R., 14 I. C. C. 1.

⁷⁹ Interstate Commerce Commission v. Delaware, L. & W. R. R., 64 Fed. 723, 5 I. C. C. Rep. 144; Interstate Commission v. Chicago G. W. Ry., 141 Fed. 1003; Howell v. New York, L. E. & W. Ry., 2 Int. Com. Rep. 162, 2 I. C. C. 272; Colorado F. & I. Co. v. Southern Pacific Co., 6 I. C. C. Rep. 488.

an arbitrary standard for fixing the compensation, regardless of other factors.⁸⁰ The value of an article is but one of many elements to be considered, especially where there is no additional cost or extra service rendered in transportation of articles of greater value.⁸¹ Thus a higher rate on hardwood than on yellow-pine lumber is not warranted by additional returns derived from the transportation of hardwood.⁸² Although value is one element considered in fixing rates, how important it is depends upon circumstances of particular cases.⁸³ But certainly no impropriety exists in a graduation of rates scheduled by the carrier scientifically in accordance with the actual values of specified commodities.⁸⁴ Likewise the quality of the commodity is to be considered in determining the reasonableness of rate, to the extent that this affects transportation itself. But to make charges correspondingly fluctuate with values of products, and resultant fluctuations of carrier's risk is impossible. It follows that rates on manufactured products ought generally to be higher than the rates on the raw materials from which they are made.⁸⁵ And smithing coal, being of greater value, may properly be charged a higher rate than ordinary bituminous coal.⁸⁶ While there is no objection to a special rate based on depreciated value of damaged goods, there is no justification for special rates on unsalable goods.⁸⁷ And the Commission has recognized that scrap tin plate, being of little value, can move only under rate relatively

⁸⁰ *Grain Shippers' Assoc. v. Illinois Central R. R.*, 8 I. C. C. Rep. 158; *Georgia Peach Growers' Assoc. v. Atlantic C. L. Ry.*, 10 I. C. C. 18; *Ohio Allied Milk Product Shippers v. E. R. R.*, 21 I. C. C. 522.

⁸¹ *Blue Grass Lumber Co. v. L. & N. R. R.*, 26 I. C. C. 438; *Keller v. St. L. S. Ry.*, 21 I. C. C. 488.

⁸² *In the Matter of Released Rates*, 13 I. C. C. 550.

⁸³ *Browne Grain Co. v. F. W. &*

R. G. Ry., 20 I. C. C. R. 410; *Rosenblatt & Sons v. C. & N. W. Ry.*, 20 I. C. C. R. 447.

⁸⁴ *Ponchatoula Farmers' Ass'n v. I. C. R. R.*, 19 I. C. C. R. 513.

⁸⁵ *Bulte Milling Co. v. C. & A. R. R.*, 15 I. C. C. 351.

⁸⁶ *Sligo Iron Store Co. v. V. P. R. R.*, 19 I. C. C. 527.

⁸⁷ *In re Reduced Rates on Returned Shipments*, 19 I. C. C. R. 409.

low compared with other articles usually classed as junk.⁸⁸ On a demand formerly made that the rates on chinaware be graded according to value, the Commission, while declining to do so in that instance, suggested that there are many reasons for adopting such a basis of rates, and referred the consideration of such a plan to the carriers.⁸⁹ As the Commission has repeatedly recognized that value is one of the established measures of a rate, it has recently held that value justified a difference in rates between liquid sheep dip and liquid tree spray.⁹⁰

§ 437. Limit of value of service.

It is clear, at any rate, that the charge is not necessarily limited to the advantage which the customer derives from the service. Thus where farmers in the west were shipping their grain for sale to the eastern markets, and they complained of the freight rates because after paying the rates they could not always realize the cost of production, the Commission held that the freight rates could not be so limited that the shipper should always be able to realize a profit, while they also held that the charges should have a reasonable relation to the cost of production and the advantage obtained by the producer from the shipment.⁹¹ "Unfortunate it may be, but still of necessity the claims of the shipper must wait upon the rights of those whose services he employs and whose property he uses. The employees who run the train may have neither brick, corn nor railroad investment, but they must be paid for their services. The road must be repaired and bridges mended. Actual and honest investment must receive fair reward. All this must be paid before the profits or actual cost of producers are paid unless the services and property of others are to be appropriated to the use of those who for

⁸⁸ *Vulcan Detinning Co. v. U. P. R. R. Co.*, 21 I. C. C. R. 93.

⁸⁹ *Union Pacific Tea Co. v. Penn. R. R.*, 14 I. C. C. 545.

⁹⁰ *Bernheim & Co. v. O. R. R. & N. Co.*, 25 I. C. C. 156.

⁹¹ *In re Rates and Charges on Food Products*, 3 Int. Com. Rep. 93, 4 I. C. C. Rep. 48.

the time may be engaged in an unprofitable business or disadvantageously located industry. We think it is true that at the prices which have at times prevailed since the gathering of the last crop, corn from the most distant fields could not be marketed at actual cost of production and pay reasonable rates. But the evil cannot be remedied without taking the services or property of men engaged in one business or employment and transferring them to those engaged in other employments. To make such transfer is a prerogative not to be exercised by any tribunal."⁹²

§ 438. Traffic will continue to move at unfair rates.

From a legal point of view it is a conclusive answer to the economic argument, that people will continue to ship goods even at unfair rates:⁹³ "When, therefore, these traffic managers met in New York and determined to advance these rates, they simply laid upon the people of this country a tax of 2 1-2 cents per hundred pounds. If they were entitled to it, that action was justified; otherwise it was unjustified. The fact that the traffic still moves, that people still eat flour and cornmeal, does not by any means conclusively show that the rate is reasonable. As we have already said, the reasonableness of every rate may be presented in two aspects: First, is it reasonable as tested by cost of service, by comparison with other rates, with respect often to commercial conditions? Second, is it reasonable as a tax imposed by a public servant for the performance of a quasi-public duty?"⁹⁴

⁹² An element of importance in the fixing of rates is the value of the article shipped, since it affects the value of service to the shipper. When, however, the carrier has established a reasonable rate on a given commodity, it cannot be required to change that rate to accord with the differing values of the commodity produced by various shippers.

Hafey v. St. L. & S. F. R. R., 15 I. C. C. 245.

⁹³ *Re Proposed Advances in Freight Rates*, 9 I. C. C. Rep. 382.

⁹⁴ While the fact that traffic moves freely has some bearing upon the reasonableness of the rates, it is not true that merely because traffic does not move the rates are therefore unreasonable. *R. R. Com'rs of Fla. v. S. Exp. Co.*, 28 I. C. C. 634.

§ 439. Worth of the service to the owners.

A railway may not impose an unreasonable rate merely because the business of the shipper is so profitable that he can pay it.⁹⁵ Certainly, a rate that nearly approaches the value of the shipment is suggestive of error, or inadvertence, in the adjustment.⁹⁶ However, it is unsound to say that, except for increased risk, rates upon cheap and valuable commodities should be the same.⁹⁷ In other words, while it is a matter to be taken into account, the value of a commodity is not controlling; and while an increase in value may be considered in advancing rates, there is a general rule against charging what traffic will bear.⁹⁸ The Commission, therefore, is clear enough that rates cannot be made solely with reference to the value of the article transported.⁹⁹ But it has said, on the other hand, that the *ad valorem* principle of rate making can never be altogether ignored.¹ Therefore, the quality of a commodity is to be considered in determining the reasonableness of the rate.² And, generally speaking, value must be taken into consideration in framing classifications.³ But minute variations in value cannot be precisely reflected in classification.⁴ A rate cannot be based upon the use to which an article is put, even if that use makes it more valuable to its owners.⁵ And to adjust rates to fluctuate correspondingly with the values of products moving under them is impossible.⁶ It is for this reason that there can be no justification for special rates on unsalable goods.⁷ The Com-

⁹⁵ R. R. Com. of Kans. v. A., T. & S. F. Ry., 22 I. C. C. 407.

⁹⁶ Beekman Lumber Co. v. St. L., I. M. & S. Ry., 15 I. C. C. 274.

⁹⁷ Union Tanning Co. v. S. Ry., 26 I. C. C. 159.

⁹⁸ National Hay Ass'n v. M. C. R. R., 19 I. C. C. 34.

⁹⁹ In re Advances in Rates, Western Case, 20 I. C. C. R. 307.

¹ Rosenblatt & Sons v. C. & N. W. Ry., 20 I. C. C. 447.

² Browne Grain Co. v. F. W. & R. G. Ry., 20 I. C. C. 410.

³ Ford Co. v. M. C. R. R., 19 I. C. C. 507.

⁴ W. E. Caldwell Co. v. C. I. & L. Ry., 20 I. C. C. 412.

⁵ Virginia-Carolina Chemical Co. v. A. C. L. R. R., 22 I. C. C. 394.

⁶ Ponchatoula Farmers' Ass'n v. I. C. R. R., 19 I. C. C. R. 513.

⁷ In re Reduced Rates, on Returned Shipments, 19 I. C. C. 409.

mission has never accepted the theory that if traffic moves freely under a given rate, that is the best test of reasonableness of rate; still it has always deemed the state of an industry a pertinent fact in considering reasonableness of its rates.⁸

§ 440. Treating the schedule as a whole.

The Commission has said that it has no authority to establish a general schedule of rates, but must deal with the interstate rates of this country, although they have not been established upon any consistent theory, as it finds them.⁹ What the Commission takes off in one place it cannot add in another, treating railways of the country as one system. Unless, therefore, the general result of all rates of the company in question is to yield an undue revenue to the carrier, the Commission should not reduce a particular rate simply because it might think, if establishing that rate *de novo* as part of the general scheme, that it ought to be somewhat lower or somewhat higher in proportion to others.¹⁰ The rate attacked must be so out of proportion as to be unreasonable, or must so discriminate as to be undue, or must be unlawful for some other special reason.¹¹ Certainly an unreasonable rate cannot be permitted, simply because the entire result of company's operations might not be as favorable as would otherwise be proper.¹² And no change will be made by the Commission if the rate involved appears already to be paying its due share of the value of the service.¹³ A just and reasonable rate must be one which respects alike the carrier's deserts and the character of the traffic. The words "just and rea-

⁸ In re Transportation of Wool, Hides, and Pelts, 23 I. C. C. 151.

⁹ Advance in Rates Cases of 1910, 20 I. C. C. 243, 306.

¹⁰ Five Per Cent Cases of 1914, Aug. 2 and Dec. 18, 1914.

¹¹ Commercial Club of Salt Lake

City v. A., T. & S. F. Ry., 19 I. C. C. 218.

¹² In re Advances in Rates, Western Case, 20 I. C. C. 307.

¹³ In re Investigation of Advances in Rates on Cement, 20 I. C. C. R. 588.

sonable" imply the implication of good faith and fairness, of common sense and a sense of justice to a given condition of facts. They are not fixed, unalterable, mathematical terms; their meaning implies the exercise of judgment.¹⁴

§ 441. Doctrine hardly applicable to passenger fares.

Charging what the traffic will bear has obviously very little scope in justifying differences in passenger fares. Plainly rich men cannot be charged more than poor, nor men with important engagements more than people who have no business interests; but then these would be forbidden as personal discriminations. However, the principle has some operation in making up a schedule of passenger fares for a railroad system. Thus suburban fares for a considerable zone around a large city are placed at considerably lower rates per mile than for long distance runs. The real reason is that a heavy passenger traffic to suburban points could not be developed at the average mileage rate for the system. So long as this is a remunerative business it would seem that it is better for the whole traffic that these concessions should be made. In one case before the Commission ¹⁵ it was said: "The granting of commutation rates for suburban travel is quite general and such rates are defensible on various grounds. They tend to benefit the public by permitting and inducing residence at considerable distance from the place of occupation, thus aiding the territorial growth of cities and relieving their congested districts. So far as they have that effect such rates in turn benefit the railways by securing business that otherwise would not exist and revenue not otherwise obtainable." ¹⁶

¹⁴ *Advances on Coal to Lake Ports*, 22 I. C. C. 604.

¹⁵ *Sprigg v. Baltimore & O. Ry.*, 8 I. C. C. Rep. 443; see *Washington Suburban Rates*, 26 I. C. C. 398 and cases cited.

¹⁶ See the later *Commutation Rate Cases*, 21 I. C. C. 428 (New York City-New Jersey) and 27 I. C. C. 549 (New York City-Connecticut).

*Topic B. Rates Reasonable Per Se***§ 442. Carrier entitled to reasonable compensation.**

The carrier is entitled to reasonable compensation for his services; and if there is no agreement as to the amount he may recover what the services are worth. To a certain extent there are external standards as to what constitutes a fair rate in that community for a given service, so that it might often be possible to say of a particular rate demanded by a particular public service company that it was reasonable or unreasonable in itself. Where there are such standards the rate which the company has established to meet its own policies or necessities must yield somewhat. But does it follow that if the rates of a certain company are no higher than these standard rates that it may justify any profits, however large, which may result from its business? It would seem that this is a situation where one or the other fundamental limitations upon a public service company must be applied, since the public is entitled to protection in either case. Thus no public service company, whatever its necessities, can charge the public more than reasonable rates; while if it is making exorbitant dividends it is not open to it to urge that its rates are not above the ordinary. Reasonable compensation for the service actually rendered is all that a common carrier is permitted to exact.¹⁷ This is the upper limit of his charge, as the Commission has pointed out; on the other hand, he is entitled to no more than a reasonable and fair return for his labor and his capital invested.¹⁸ The question of the reasonableness of a rate is always one of fact.¹⁹ And this must be determined upon every complaint; for, as the Commission always insists, every shipper is entitled to reasonable rates.²⁰ Generally speaking the rate attacked

¹⁷ *Coxe v. Lehigh R. R.*, 3 Int. Com. Rep. 460, 4 I. C. C. 535.

¹⁸ *Brabham v. Atlantic C. L. Ry.*, 11 I. C. C. Rep. 464.

¹⁹ *Kansas City Ass'n v. M. P. Ry.*, 14 I. C. C. 597.

²⁰ *Corn Belt Meat Producers' Ass'n v. C., B. & Q. Ry.*, 14 I. C. C. 376.

must be so out of proportion as to be unreasonable, or must so discriminate as to be undue.²¹

§ 443. General principles as to reasonableness.

A variety of practical considerations must enter into making of freight rates and determine to a great extent whether rates are reasonable.²² The earnings and expenses of operating, rates charged upon the same commodity upon other roads as nearly similarly situated as may be, the diversities between the railroad in question and such other roads, the relative amount of through and local business, the proportion borne by the commodity in question to the remainder of the local traffic, the market value of the commodity and its gradual reduction, the reductions made by the carrier upon other articles which are consumed and necessarily required by the producers of the article in question, and all other circumstances affecting the traffic of itself and as related to other considerations, enter into the charges of the carrier.²³ All the surrounding circumstances must be considered as well as the rights of the shipper; and if these circumstances and conditions are so compulsory or imperious that they fairly and justly exercise any controlling influence in the making of the rate, they cannot be disregarded in a proceeding in which the reasonableness and justness of the rate is presented for determination.²⁴ In passing upon the reasonableness or rates, the question whether they afford the carrier a proper return for the service rendered is to be considered, as well as the result of the business to the shipper or producer of the traffic.²⁵ Under no circumstances should they be so low as to impose a burden on other traffic.²⁶

²¹ *Hilton Lumber Co. v. Wilmington & W. R. R.*, 9 I. C. C. 17.

²² *Gustin v. A. T. & S. F. Ry.*, 8 I. C. C. 277.

²³ *Evans v. Oregon Ry. & Nav. Co.*, 1 Int. Com. Rep. 641, 1 I. C. C. 325.

²⁴ *Business Men's Ass'n v. Chica-*

go, S. P., M. & O. Ry., 2 Int. Com. Rep. 41, 2 I. C. C. 52.

²⁵ *Loud v. South Carolina Ry.*, 4 Int. Com. Rep. 205, 5 I. C. C. 529.

²⁶ *Re Rates and Charges on Food Products*, 3 Int. Com. Rep. 93, 4 I. C. C. 48.

But a railroad under the Act cannot be compelled to increase its rates, though they are so low as to be ruinous to itself or its rivals. The provision that all rates shall be just and reasonable, was intended for the protection of the general public, and not for that of the carrier against the action of its own officers or the action of rivals.²⁷ The Commission is authorized to condemn an existing rate and prescribe a reasonable maximum rate to be charged in the future, only when upon consideration of all the facts, circumstances and conditions appearing, it is of the opinion that the rate complained of is unreasonable or unjust.²⁸

§ 444. Customary rate presumably reasonable.

A railroad company by putting in force and continuing in force a rate of charges, furnishes evidence that the rate is profitable, and if it increases a long-established rate, the new rate will be presumed to be unreasonably high.²⁹ So where a certain rate had been long established for delivery in New York, and the railroad company changed its practice and made delivery in Jersey City, but charged the same rate, this rate, being for less service, was held *prima facie* unreasonable.³⁰ Where carrier voluntarily maintained a rate between certain points for a long period of time, the presumption is that such rate is reasonable; and where a long-established rate is raised for a short period, and then voluntarily reduced to the former point, the presumption is that the advanced rate is unreasonable.³¹ But a former special rate is not a fair test of the reason-

²⁷ Re Chicago, S. P. & K. C. Ry., 2 Int. Com. Rep. 137.

²⁸ Marshall Oil Co. v. C. & N. W. Ry., 14 I. C. C. 210.

²⁹ Re Rates and Charges on Food Products, 3 Int. Com. Rep. 93, 4 I. C. C. 48; Coxe v. Lehigh Valley R. R., 3 Int. Com. Rep. 460, 4 I. C. C. 535; Railroad Commission v. Savannah, F. & W. Ry., 3 Int. Com.

Rep. 688, 5 I. C. C. 13; National Hay Ass'n v. Lake Shore & M. S. R. R., 9 I. C. C. Rep. 264; Central Yellow Pine Assoc. v. Illinois Central R. R., 10 I. C. C. Rep. 505; Tift v. Southern Ry., 10 I. C. C. Rep. 548.

³⁰ Truck Farmers' Ass'n v. Northeastern R. R., 6 I. C. C. Rep. 295.

³¹ Sunderland Brothers Co. v. P. M. R. R., 16 I. C. C. 450.

ableness of present rates, the Act having abolished special and preferred rates.³² And, as the Commission has exclusive jurisdiction over interstate rates, it is not necessarily bound to follow decisions of State commissions.³³ There may be a presumption that rates fixed by a State commission are reasonable, and the burden of proof is upon the railroad companies to show the contrary, but the presumption is not binding upon the Interstate Commission.³⁴ In comparing rates it is to be noted that traffic demanding special service is not justly compared with traffic not asking such consideration.³⁵ The public is entitled to depend, within bounds, upon the continuance of rates when they are once established.³⁶ It has often been pointed out that the long existence of a rate prejudices an advance.³⁷ For that reason among others, an advanced rate in the absence of good showing by the carriers tending to justify the advance, will be presumed to be unreasonable.³⁸ But while it is always persuasive, yet it is not conclusive that, because rates were lower at one time, the present rates are unreasonable.³⁹

§ 445. Rates unreasonable in themselves.

Occasionally a case will come up when the competition between the principle of protecting the carrier in its fair return and the principle that no more than a reasonable charge should be exacted from the shipper is not a difficult issue to decide. For sometimes the unreasonable character of the charge exacted will be so apparent that the case for the shipper will be unaffected by the most skillful argu-

³² *Myers v. Pennsylvania Co.*, 2 Int. Com. Rep. 403, 2 I. C. C. 573.

³³ *Railroad Commission of Wisconsin v. C. & N. W. Ry.*, 16 I. C. C. 85.

³⁴ *Brabham v. Atlantic C. L. R. R.*, 11 I. C. C. Rep. 464.

³⁵ *Waco Freight Bureau v. H. & T. C. R. R.*, 19 I. C. C. 22

³⁶ *Western Oregon Lumber v. S. P. Co.*, 14 I. C. C. 61.

³⁷ *Memphis Freight Bureau v. L. & N. R. R.*, 26 I. C. C. 402.

³⁸ *Sunderland Bros. Co. v. P. M. R. R.*, 16 I. C. C. 450.

³⁹ *Lagomarcino-Grup Co. v. I. C. R. R.*, 16 I. C. C. 151.

ment for the carrier. Thus in one case under examination by the Commission,⁴⁰ the railroad company met the charge that the rate established was unreasonable by attempting to show that they were earning no more than a fair return. But the Commission, in holding for the complainant, seized upon the obvious fact that the rates were plainly unreasonable in themselves. On that point it was said: "In the fiscal year which had just closed when this proceeding was commenced, the average rate received by the railway companies of the United States for hauling one ton of freight one mile, was less than 1 cent. The average received by the railway companies, including the defendants, operating in the territorial group composed of the States of Arkansas, Missouri, Kansas, parts of the States of Colorado and Texas, and Indian and Oklahoma Territories, and part of the Territory of New Mexico, was less than 1.2 cents. The Eureka Springs Railway Company received more than 10 cents per ton per mile, which is about nine times the average amount received by the railway companies operating lines in said States and Territories so grouped, because of similarity of, or in respect to, density of population, topography and nature of the country, character of industries served by railways, and other characteristics affecting the question of the cost and reasonable compensation for railway service."⁴¹

⁴⁰ *Cary v. Eureka Springs Ry.*, 7 I. C. C. Rep. 286.

Nine mills per ton per mile is generally speaking too high a rate normally for low grade freight on longish hauls. *Winston-Salem v. Norfolk & W. R. R.*, 16 I. C. C. 12.

⁴¹ A rate unreasonable in itself to the person served cannot stand. See *New Orleans C. Ex. v. Cincinnati, N. O. & T. P.*, 2 Int. Com. Rep. 289, 2 I. C. C. Rep. 375; *Cary v. Eureka Springs Ry.*, 7 I. C. C. Rep. 286.

The Commission is not ready to accept the theory that rates may be lawfully and reasonably increased by progressive advances as long as the traffic moves freely, and until the highest point under which the traffic will move freely is reached; some traffic will move, and reasonably freely, up to the point where the rate becomes prohibitive. *Commercial Club of Omaha v. Anderson & Saline River Co.*, 18 I. C. C. 532.

§ 446. What makes rates unreasonable?

Upon a complaint to the Commission for reduction of rates the burden is on the complainant to establish his case; it must affirmatively appear that charges assailed as unreasonable are so and ought to be reduced.⁴² The reasonableness of a rate must of necessity depend upon the conditions surrounding the traffic at the time it moves. The length of the haul, the competition to be met, the cost of the service, the value of the service, the density or volume of the tonnage, as well as the general transportation conditions then existing, are factors that have a more or less definite relation to the rate that a carrier may reasonably demand for a transportation service. And these factors, except, possibly, the length of the haul, the grades and other transportation conditions, are in their nature neither permanent, nor fixed, but necessarily change with the general economic panorama.⁴³ Where a change of rates would involve a reduction of rates on other competing lines not parties to the proceeding, and unsettle relative rates in a large extent of territory, such a change ought not to be made unless based upon clear grounds.⁴⁴ While, as has been seen, the reasonableness of a rate may be tested by comparison with similar rates, such comparison alone, without other evidence, will not justify the conclusion that a rate is unreasonable.⁴⁵ The Commission recognizes, therefore, that there can be no rule by which a set absolute maximum limit of reasonableness can be fixed with certainty of a demonstration; it all depends upon the preponderance of the evidence adduced in accordance with

⁴² *Lincoln Creamery v. Union P. Ry.*, 3 Int. Com. Rep. 794, 5 I. C. C. 156; *Duncan v. Atchison, T. & S. F. R. R.*, 6 I. C. C. Rep. 85.

⁴³ *Memphis Cotton Oil Co. v. I. C. C. Ry.*, 17 I. C. C. 313, 318.

⁴⁴ *Rice v. Western N. Y. & P. Ry.*, 2 Int. Com. Rep. 298, 2 I. C. C. 389; and see *Dallas Freight Bureau v. Texas & P. Ry.*, 8 I. C. C. Rep. 33.

⁴⁵ *Allen v. Oregon Ry. & Nav. Co.*, 106 Fed. 265; *Interstate Commerce Commission v. Nashville, C. & S. L. Ry.*, 120 Fed. 934, 57 I. C. C. A. 224; *Kentucky R. R. Com'rs v. Cincinnati, N. O. & T. P. Ry.*, 7 I. C. C. Rep. 380; *Chattanooga Chamber of Commerce v. Southern Ry.*, 10 I. C. C. Rep. 111.

principles of law applicable to the determination of facts. Therefore, when in 1910 by the Mann Act, the burden of establishing the reasonableness of an advance was shifted to the carrier, a change of great importance was made in the administration of the law, although the burden still rests upon a complainant seeking to have a rate reduced.⁴⁶

§ 447. Current rates for other transportation.

It would seem that while not the legal measure of proper charge, the current rates for other transportation within the same territory by the company in question or by other companies performing similar services, is evidence which will furnish a test for the value of the particular services in question. This was one of the strongest arguments brought forward in the "Naval Stores Case,"⁴⁷ to show that the Savannah rates were themselves unreasonable. A part of the language of Judge Speer on this point is quoted to show this method of testing the reasonableness of rates by comparison of hauls on other lines similarly situated fairly comparable with the distances involved. "In every instance the average distance on the roads last mentioned to the point of destination is much greater than the average distance from Pensacola & Atlantic stations to Savannah, and yet the rate is invariably much less. We find that it costs more to ship cotton from River Junction to Savannah, 259 miles, than it does to ship cotton from Sneads, a station on the Pensacola & Atlantic, 6 miles from River Junction, to New York, a distance of 1,173 miles, or from the most distant point in Mississippi to Norfolk, 1,154 miles. The facts ascertained by the Commission and herein set forth are of the highest significance. In the absence of satisfactory reply by the respondents, they must control the action of the court."⁴⁸

⁴⁶ *Anadarko Cotton Oil Co. v. A., T. & S. F. Ry.*, 20 I. C. C. 43.

⁴⁷ *Interstate Com. Com. v. Louisville & N. Ry.*, 118 Fed. 613.

⁴⁸ See, also, *Freight Bureau v. Cincinnati, N. O. & T. R. Ry.*, 6 I. C. C. Rep. 195.

§ 448. Comparison with other rates.

Where the reasonableness of rates is in question, comparison thereof may be made, not only with rates on another line of the same carrier, but also with those on the lines of other and distinct carriers.⁴⁹ But in determining the reasonableness of rates a comparison of one isolated rate with another is not sufficient; the whole field must be considered in order to approximate justice, and at best the result cannot be regarded as other than an approximation.⁵⁰ Thus the unreasonableness of a rate for mileage tickets cannot be proved by showing that it is higher than the rate for commutation tickets.⁵¹ And a finding that the rates charged by railroads for shipments to a particular point are unreasonable in themselves cannot properly be based on evidence which only tends to show that they are too high as compared with the rates charged between the initial points and one or two other points.⁵² Any comparison of rates must first be shown to be proper by establishing a similarity in the rates compared.⁵³ Thus rates on branch lines and main lines cannot be compared, because of this dissimilarity of conditions.⁵⁴ Nor can rates in different sections of the country be used in comparison, because of the difference in costs.⁵⁵ Rates in different directions cannot be compared, because it may be more advantageous to move traffic in one direction.⁵⁶ Of course, even in a case of admitted simi-

⁴⁹ *Cincinnati Freight Bureau v. Cincinnati, N. O. & T. P. Ry.*, 4 Int. Com. Rep. 592, 6 I. C. C. Rep. 195; *Morrell v. Union Pac. Ry.*, 4 Int. Com. Rep. 469, 6 I. C. C. Rep. 121.

⁵⁰ *Howell v. New York, L. E. & W. R. R.*, 2 Int. Com. Rep. 162, 2 I. C. C. 272.

⁵¹ *Assoc. of Wholesale Grocers v. Missouri Pac. Ry.*, 1 Int. Com. Rep. 321, 1 I. C. C. 323.

⁵² *Interstate Commerce Commis-*

sion v. Nashville, C. & S. L. Ry., 120 Fed. 934, 57 C. C. A. 224.

⁵³ *Evans v. Union Pacific Ry.*, 6 I. C. C. Rep. 520.

⁵⁴ *Northwestern L. G. & S. S. Assoc. v. Chicago & N. W. Ry.*, 2 Int. Com. Rep. 431, 2 I. C. C. 604.

⁵⁵ *Morrell v. Union Pacific Ry.*, 4 Int. Com. Rep. 469, 6 I. C. C. Rep. 121.

⁵⁶ *Duncan v. Atchison, T. & S. F. R. R.*, 4 Int. Com. Rep. 385, 6 I. C. C. Rep. 85.

larity, the difference in rates may be explained, as where the lower rate is a violation of the Act;⁵⁷ or where the lower rate was given by mistake, which the carrier is endeavoring to correct.⁵⁸ However, when all is said, one of the most satisfactory tests of the reasonableness of the rates of one carrier is a comparison with the rates of other carriers operating in the same territory under the same general conditions.⁵⁹ But, before the Commission can conclude that a rate on a given commodity is too high, because it is higher than some other rate named, it must know that the route selected as the standard for a comparison is a reasonable and a fair one.⁶⁰

§ 449. Evidence inadmissible unless conditions are similar.

This comparison cannot be made, however, without considering dissimilar conditions; and conditions may be so dissimilar that no comparison would be proper. Thus in the case of *Hooper v. Chicago, Milwaukee and St. Paul Railway*,⁶¹ Mr. Justice Kinne said: "Evidence was admitted as to the charges made by defendant in other States, but the court excluded evidence as to rates charged by other companies in other States and other roads in this State. The questions asked touching these matters were very numerous, and cannot all be set out here. In each case, however, the offered testimony was properly excluded because it was not shown that the circumstances and conditions were substantially the same as to the road inquired about as in the case at bar. One or two questions will serve to illustrate: 'Will you state to the court the

⁵⁷ *Squire v. Michigan Central R. R.*, 3 Int. Com. Rep. 515, 4 I. C. C. 611.

⁵⁸ *Rea v. Mobile & O. Ry.*, 7 I. C. C. 43.

⁵⁹ *Chamber of Commerce of Milwaukee v. C., R. I. & P. Ry.*, 15 I. C. C. 460.

⁶⁰ *Darling & Co. v. B. & O. R. R.*, 15 I. C. C. 79.

⁶¹ 91 Iowa, 639, 60 N. W. 487.

In order to sustain reasonable rates to intermediate points, unreasonable rates between more distant points cannot be sustained. *Norfolk & W. Ry. v. United States*, 195 Fed. 953.

rates that were being charged at that time in the different States of the Northwest on the different roads?" 'State what was the charge of the different roads in Iowa for the transportation of lime in 1888.' It requires no argument to show that the charges for carrying a like commodity on another road in Iowa or elsewhere would have no tendency to show the reasonableness of defendant's charges for a shipment of lime from Maquoketa to Sioux City, Iowa, unless the circumstances which must be taken into consideration in fixing the rate inquired about are substantially the same as those applying to the road in controversy. The proper foundation for the introduction of such evidence, even if admissible, was not laid." ⁶²

§ 450. Comparison of rates between different localities.

The rules against undue preference and their limitations have often been stated.⁶³ The Commission does not accept the theory that one carrier's rate is unreasonable simply and solely because another carrier had at the time a lower rate; for what is reasonable for one carrier may not be reasonable for another.⁶⁴ Freight rates are controlled by various and varying conditions; and, therefore, rates in one section furnish no reliable standard by which to measure the reasonableness of rates in another section, where dissimilar conditions prevail.⁶⁵ Rates can seldom be tested, even as to their reasonableness, strictly by themselves, but must be considered to an extent in reference to their environment.⁶⁶ The unreasonableness of a

⁶² Compare *Interstate Commerce Commission v. Louisville & N. Ry.*, 73 Fed. 409.

It is not within the authority of the Commission to reduce rates not merely against the weight of the evidence produced to sustain them, but without anything substantial to warrant the conclusion reached or the reasons assigned therefor. *Louisville & N. R. R. v.*

Interstate Commerce Commission, 195 Fed. 541.

⁶³ *Morrell v. Union Pacific Ry.*, 6 I. C. C. 121.

⁶⁴ *Swift & Co. v. C. & A. R. R.*, 16 I. C. C. 426.

⁶⁵ *Acme Cement Plaster Co. v. L. S. & M. S. Ry.*, 171 C. C. 30.

⁶⁶ *Southwestern Missouri Millers' Club v. M., K. & T. Ry.*, 22 I. C. C. 422.

rate cannot be established by comparison with rates on other lines operating in different territory, where no evidence is offered to explain the conditions under which such rates were established, or to compare the circumstances of carriage in such other territory with the movement between the points in question.⁶⁷ Before the Commission can conclude that a rate on a given commodity is too high, because it is higher than some other rate named, it must know that the rate selected as the standard of comparison is a reasonable and a fair one.⁶⁸ Certainly, the unreasonableness of the rate is not established by evidence merely showing that a lower rate is in effect over another route.⁶⁹ And a commodity rate to one point over one line affords no basis of comparison with a higher class rate to a longer distance point over two lines.⁷⁰ It follows that the fact that the cost by rail is higher than by boat, does not establish unreasonableness of the rail rate.⁷¹

§ 451. Usual rates govern passenger fares.

The principle of permitting the railroads under ordinary circumstances to charge usual rates of fare is particularly useful in dealing with the validity of passenger fares. There are certain standards of what will constitute a not unreasonable charge per mile for a passenger in most communities which it can hardly be shown to be unreasonable to maintain. Thus in one proceeding⁷² the Interstate Commerce Commission said: "We cannot find upon this record that \$1.10 is an unreasonable charge from Niagara-on-the-Lake to Buffalo. This is a branch line of the defendant and the case does not show density of traffic,

⁶⁷ *Crutchfield & Woolfolk v. L. & N. R. R.*, 14 I. C. C. 558.

⁶⁸ *Darling & Co. v. B. & O. R. R.*, 15 I. C. C. 79.

⁶⁹ *Ohio Iron & Metal Co. v. Wabash R. R.*, 18 I. C. C. 299; *Pankey & Holmes v. C. N. E. Ry.*, 18 I. C. C. 578.

⁷⁰ *Wells-Higman Co. v. St. L., I. M. & S. Ry.*, 18 I. C. C. 175.

⁷¹ *Louisville Cotton Seed Products Co. v. L. & N. R. R.*, 26 I. C. C. 607.

⁷² *Cist v. Michigan Central Ry.*, 10 I. C. C. Rep. 217.

nor the circumstances under which the passenger service is performed. It simply appears that a rate of 3 cents per mile is imposed. While lower rates are in force in many parts of the United States, it is also true that there is hardly any section of the country in which a rate as high as 3 cents per mile is not charged for a local service of this distance. The fact that a rate of 85 cents is made during the summer season to meet competition via Lewiston is not controlling, nor is the further fact that the New York Central under compulsion of law establishes a rate of 2 cents per mile from Lewiston to Buffalo. We do not find that this rate is reasonable; we simply fail to find that it is unreasonable, as there is no evidence in the record upon which an intelligent judgment can be formed. This is a most unsatisfactory disposition of the question, and if the case were of wider application, or the subject of more general complaint, it would be our duty to proceed on our own motion to develop the necessary facts."⁷³

Topic C. Rates Dictated by Competition

§ 452. Rates may be made to meet competition.

Within the many limitations which are discussed throughout this book, a railroad company may make such rates as it is necessary for it to make to meet competition. But whatever may have been the practice in the past of meeting the rate, the tariffs as scheduled must now be adhered to.⁷⁴ A great deal of transportation is conducted under competitive conditions, the shipper having an alternative route by which he may get his goods to market. Under such circumstances railway rates between the competitive points will inevitably tend to be lower than between points where there is no competition. To a certain extent the public is rejoiced to see lower rates from whatever cause, and it will in an ordinary case be unquestioned that the carrier may make his competitive

⁷³ See *Kurtz v. Pa. Ry.*, 16 I. C. C. 410.

⁷⁴ *Menefee Lumber Co. v. T. & P. Ry.*, 15 I. C. C. 49.

rates as low as is necessary to get the business. But this statement is subject to certain limitations, some of which will now be discussed, but most of which are discussed more fully in later chapters. However, it is now appreciated that rate wars create a disturbing condition, and that their results cannot be used as a measure of reasonableness.⁷⁵

§ 453. Competition as a factor in rate making.

But while the "law of increasing returns" cannot be pressed too far, it contains an element of truth which may be considered in fixing a particular rate. If traffic may be acquired by a specially low rate which would otherwise be lost, to acquire the traffic would benefit rather than burden other traffic of a different kind, since if under the law of increasing returns it is remunerative, the profit thus earned will tend to diminish the rates charged on the remaining traffic.⁷⁶ On this ground competition may be considered as a factor in fixing rates. If a carrier is carrying goods from two stations, at one of which there is competition, the rate at the station where the competition exists may fairly be reduced, so far as is absolutely necessary to secure the traffic, provided the reduced rate remains a remunerative one under the law of increasing returns. If the rate were not reduced, *ex hypothesi*, the traffic would be lost, and the profit realized upon it must be exacted from the non-competitive traffic; if, on the other hand, the rates were reduced equally all over the road, the carrier could not earn a fair return from his whole schedule, since we are assuming that the necessary competitive rate is so low as to be profitable only as a result of the law of increasing return. The same result will follow if the competition affects not a particular station but a particular class of goods. It is therefore always fair even

⁷⁵ *Morgan Grain Co. v. A. C. L. R.*
R., 19 I. C. C. 460.

no justification for advance, where
such rate was not unusually low.

⁷⁶ Little movement under a given
rate to stimulate given article, is

In re *Advances on Potatoes*, 25 I.
C. C. 247.

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to the shipper who does not get the benefit of the competition to consider competition as a factor in reducing the rate.⁷⁷

§ 454. Policy for permitting competitive rates.

The policy of this matter seems to be to permit the making of rates to meet competition even if proportionately they seem preferential, in order that competition may be possible, which it could not be without this permission. This is very acutely said by Lord Herschell in *Phipps v. London & North Western Railway Company*:⁷⁸ "Suppose that to insist on absolutely equal rates would practically exclude one of the two railways from the traffic, it is obvious that those members of the public who are in the neighborhood where they can have the benefit of this competition would be prejudiced by any such proceedings. And further, inasmuch as competition undoubtedly tends to diminution of charge, and the charge of carriage is one which ultimately falls upon the consumer, it is obvious that the public have an interest in the proceedings under this Act of Parliament not being so used as to destroy a traffic which can never be secured, but by some such reduction of charge, and the destruction of which would be prejudicial to the public by tending to increase prices."⁷⁹

§ 455. Rates low enough to hold business.

Without going into the many problems as to local discrimination, the result largely of statutory provisions and their construction, which are discussed later, it may be pointed out briefly that it is a general principle recognized in all of those cases that it is permissible to make the competitive rate low enough to get business and to hold it.

⁷⁷ Revenue derived from divisions on through business makes it possible to reduce rates on other traffic, which would not be possible otherwise. *New Pittsburgh Coal Co. v. H. V. Ry.*, 26 I. C. C. 121.

⁷⁸ (1892) 2 Q. B. 229.

⁷⁹ Circumstances tending to negative presumption of unreasonableness of greater charge to shorter-distance points. *Fisk & Sons v. B. & M. R. R.*, 19 I. C. C. 299.

It may be true, as will appear later in this book, that the number of carriers actually competing for traffic, and a constantly open water route present to take a large part of it whenever the railroad rates rise up to the mark of profitable water carriage, seem to the Commission to constitute circumstances and conditions at one point substantially dissimilar from those at another point where no such conditions exist. But a rule that, whenever all-rail carriers establish rates to a given point, they must take notice of the independent water rates from that point, and of the territory that can be reached thereunder, and must make such adjustment as will prevent the use of the water rates from that point to another point, resulting in discrimination against that other point by reason of its all-rail rate adjustment, has no support in law.⁸⁰ As the law stands, in the absence of actual and effective competition compelling the carriers to make rates upon traffic upon a competitive basis, the Commission is called upon to fix reasonable rates which shall be used as maxima, which, however, the carriers may reduce to meet competition with other carriers and between themselves, as they may deem advisable, so long as they do not discriminate.⁸¹

§ 456. Reduction below a remunerative basis.

This principle permitting the carrier to make in particular instances low rates to meet competition has its limitations; it will not justify the making of rates which will not be remunerative, as that must result in throwing undue burdens upon others. The principle of relative justice applied is that when a carrier, by reason of competitive conditions, or for other reasons, serves certain localities at very low rates, the concessions made must not subject other localities or other patrons dependent on the same carrier to undue or unreasonable prejudice or disadvantage, but there must be an equitable adjustment of rates

⁸⁰ *Bainbridge Board of Trade v. L. H. & St. L. Ry.*, 15 I. C. C. 506.

⁸¹ *Okla. & Ark. Coal Traffic Bu. v. C., R. I. & P.*, 14 I. C. C. 216.

so that there is no unjust discrimination between competitors in like pursuits.⁸² "There may be cases in which a carrier legitimately engaged in serving some territory is compelled by some new and aggressive competition to reduce normal and reasonable rates to retain business for its line, and where corresponding reductions at points not affected, or less affected, by destructive competition, might be unreasonable. But when a carrier voluntarily enters a field of competition where, by reason of a disadvantageous route, or the rigor of the competitive conditions, remunerative rates cannot be charged, and its service to a portion of its patrons is unprofitable, it accepts the legal obligation that its service shall be impartial to all who sustain similar relations to the traffic, and from whom the service itself is not substantially dissimilar."⁸³

§ 457. Standard rate among competing lines.

Where a competitive situation has become established by presence of various competing lines performing the same service to the community, it tends to become settled between the competitors what shall be the standard rates and what differentials shall be allowed from these rates. The standard rate might be that established by the shortest and otherwise best located road, but it would not be fair in reducing rates all over the territory involved to reduce all rates to the lowest margin of profit fair to that particular road, for other roads could not meet that rate without ruin, it may be. On the other hand, it would be bad public policy to permit as an artificial standard what the most

⁸² Re Chicago S. P. & K. C. Ry., 2 Int. Com. Rep. 137, 2 I. C. C. Rep. 231.

The fact that there is competition between communities for the purchase of a commodity does not justify the carrier transporting the same to levy an unreasonable rate on one community. Nebraska State Railway

Commission v. U. P. R. R., 13 I. C. C. 349.

⁸³ Manufacturers & Jobbers' Union v. Minneapolis & S. L. R. R., 3 Int. Com. Rep. 115, 1 I. C. C. Rep. 227.

That carriers may meet water competition at whatever point and to whatever extent they see fit cannot be admitted. City of Spokane v. N. P. Ry., 19 I. C. C. 162.

circuitous and worst located road might need to make a good profit. As in most problems of rate making the result must be some compromise. This was pointed out by the Commission in one of its investigations,⁸⁴ the Commission saying that it might be manifestly unfair to select a single advantageous line and make that the standard. For example, a rate to the seaboard on grain which upon any fair basis of compensation to investment would be reasonable for the southerly lines would be extravagantly high for the trunk lines. To permit such a rate would be to impose upon the general public the payment of an exorbitant charge. It should be noted, however, that, in the days of the Commerce Court, that tribunal took judicial notice of the fact that the interstate rates prescribed for the transportation of freight by a common carrier must necessarily be more or less interdependent, or at least be so related to each other, that the rate-making power will not, simply because it has the power, fix a rate upon a single line of railroad which will necessarily disorganize established and reasonable rates on other railroads in the same territory.⁸⁵

§ 458. Competition not a ground for raising rates.

There are occasional cases where a road has urged the presence of competition as a ground for raising rates. To put one case⁸⁶ in the language of the Commission in passing upon it: "Previous to the summer of 1887, grain and other freights destined to Portland from points further

⁸⁴ Re Proposed Advances in Freight Rates, 9 I. C. C. Rep. 382.

Rates not as a matter of fact are fixed solely with reference to weaker competing line; cost of handling traffic over short and easy line largely influences rates. Commercial Club of Salt Lake City v. A., T. & S. F. Ry., 19 I. C. C. 218.

⁸⁵ Hooker v. Interstate Commerce Commission, 188 Fed. 242.

In determining the reasonableness

of rates from the West to southern territory, the interests of all competing lines must be considered, and not merely that line which can handle the business cheapest. *Receivers' & Shippers' Ass'n of Cincinnati v. C., N. O. & T. P. Ry.*, 18 I. C. C. 440.

⁸⁶ *Morrell v. Union Pacific Ry.*, 8 Int. Com. Rep. 181, 6 I. C. C. Rep. 121. See also *Lumber Rates from Memphis*, 27 I. C. C. 471.

east, including Pullman, passed over the lines of the Oregon Railway & Navigation Company. In 1887 and 1888 the Northern Pacific Railroad Company extended its lines west to Tacoma, thence to Portland, and east to Pullman and other points in the grain growing region in southeastern Washington, and over its lines so extended the Northern Pacific Company took from Pullman and other points a considerable part of the wheat and other freights which would otherwise have been carried over the road of the Oregon Railway & Navigation Company. The defendants urge this diversion of Pullman and other traffic from their lines in justification of higher transportation charges than would be reasonable if there was no competition for Pullman business. Competition, or a division of business as the result of building a second road where previously but one existed, should justify lower rather than higher charges." The conclusion of the Commission is undoubtedly the proper way of dealing with such a case, but the reason is not quite obvious. It is plain that there is always some waste in all competition which makes a certain additional cost to be borne by the traffic because of the additional fixed charges by reason of unnecessary duplication of plant. But more than this, perhaps, is the increased cost of transportation by reason of decrease in the volume of traffic, consequent upon the division of the business among the competing lines. And yet the principle of value of the service to the shipper seems to come into play here; for the service is worth no more to the shipper whether there be one line or three.⁸⁷

§ 459. Absence of competition does not justify increase.

To the extent that competition becomes more remote the power to raise rates to any amount that the traffic will bear increases until a point is reached where there is no

⁸⁷ That the business of the express companies has been cut into by the parcel post to such an extent as to increase its operating ratio very sharply is no justification for not putting express rates upon a basis which otherwise is reasonable. In re Express Rates, 24 I. C. C. 380.

virtual competition and then that power becomes absolute; but as has been seen already in this chapter, the public needs the protection of the law of the land in this situation, for the economic limitation leaves scope for gross oppression. It is therefore plain law that the absence of competition does not justify an increase in rates. The elimination of railroad competition by the aggregation of large systems has been the characteristic fact in railroad history during the last twenty-five years; and indeed within the last ten years there has been a further extra-legal consolidation of many of these systems by communities of interest, until to-day there are comparatively few groups.⁸⁸ "Such unification of railway control permits advances in rates and a maintenance of rates which has never before been possible. If carriers are entitled to larger returns, these increases are proper, and should be permitted; otherwise they should be checked. It cannot be accepted without careful consideration that all this vast increase in traffic, all these notable economies in railway operation are to result in the permanent imposition of higher transportation charges."⁸⁹

§ 460. No obligation to meet competition.

The Commission has recognized what it considers to be the natural right of the carrier to establish low rates to

⁸⁸ Re Proposed Advances of Freight Rates, 9 I. C. C. 382.

Competition has a more or less definite relation to the rate that carrier may reasonably demand. *Memphis Cotton Oil Co. v. I. C. R. R.*, 17 I. C. C. 313.

⁸⁹ While a carrier may establish a lower rate to meet competitive conditions and the Commission takes into account such conditions in passing upon the reasonableness of the rate adjustment, it does not follow that in a particular instance the Commission will condemn an ad-

vance of a rate which was formerly maintained to meet competition between different producing points. *Florida Fruit & Vegetables Ass'n v. A. C. L. R. R.*, 17 I. C. C. 552.

By the last paragraph of section 4 of the Act as amended in 1910 it is provided that, if rail rates have been reduced to meet water competition, they shall not later be advanced for no other reason than that the water competition has been discontinued; see *Am. Insul. W. C. v. Ch. & N. W. Ry.*, 26 I. C. C. 415.

meet competition over other routes.⁹⁰ A carrier may, therefore, for competitive reasons, voluntarily do things which it may not lawfully be compelled to do.⁹¹ There is no principle of law that requires a carrier to be content with a part of the traffic, or that forbids it to adjust its rates so as to fight, the moment it feels the effect of its competitors' rates.⁹² A carrier may, therefore, voluntarily make under the force of controlling competition, rates which it might not be required to make.⁹³ And a competitive rate cannot be said to be voluntary reduction, and ought not to be used as a standard of comparison.⁹⁴ But while the law permits carriers to make and maintain a low rate under stress of competition, there is no law requiring the carriers to make such a rate.⁹⁵ It is for this reason that a competitive rate is not a measure of the reasonableness of a non-competitive rate.⁹⁶ And the Commission has often remarked that it is obvious that a competitive rate to one point is not a measure of rate to a non-competitive point. Where, owing to competition, a rate is unnecessarily low, it affords no basis for comparison. A rate comparatively the lowest in its territory on a given article of freight, and by reason thereof made the basis of reductions from competitive points, will not be further reduced on the ground alone that it had at stated periods in the past been somewhat lower, unless shown to be unreasonably high for the service performed.⁹⁷ In fixing rates on competitive articles, the relation should be determined on the basis of difference in cost of service, and many of the other considerations entering into establish-

⁹⁰ *Indianapolis Freight Bureau v. Ass'n v. A., T. & S. F. Ry.*, 24 I. C. C. C. & St. L. Ry., 26 I. C. C. 53. C. 570.

⁹¹ *Swift & Co. v. C. & A. R. R.*, 16 I. C. C. 426. ⁹² *Oregon & Washington Lumber Mfrs. Ass'n v. U. P. R. R.*, 14 I. C. C. 1.

⁹³ *Bulte Milling Co. v. C. & A. R. R.*, 15 I. C. C. 351. ⁹⁴ *Commercial Club of Superior v. G. N. Ry.*, 24 I. C. C. 96.

⁹⁵ *Indianapolis Freight Bureau v. P. R. R.*, 15 I. C. C. 567. ⁹⁷ *Warren Manufacturing Co. v. Southern Ry.*, 12 I. C. C. 381.

⁹⁶ *Southwestern Shippers' Traffic*

ment of rates upon independent or isolated articles should be in large part eliminated.⁸⁸

§ 461. Competition in passenger fares.

Competition dictates particular rates in passenger schedules to a certain extent, but the differences between stations by this process are not made glaring. It is true that between competitive points fares are kept down, but this tends to shrink the whole schedule relating to intermediate stations. Even the most extreme cases are usually those where the long haul between competitive points is charged relatively less than the short haul, or in some cases where the short haul is made as high as the long haul;⁸⁹ but if a railroad attempted to charge more for a short haul than for a long haul it would hardly be possible to make the public accept a difference of this sort. The general operation of competition upon passenger fares is to keep all down to a lower level. The matter of joint through rates, discussed at another place, gives more scope to the doctrine that particular rates may be lowered to meet competition. Thus the part of a through passenger rate apportioned to one of several railroads as its share may often be less than the rate which that railroad makes between its own termini to its own passengers; as these joint through rates may be reduced to meet competition this difference is justified.¹

Topic D. Rates Designed to Equalize Advantages

§ 462. Operation of the principle of equalization.

This topic as to the limitations placed by the law upon making rates designed to equalize advantages is again one that will receive attention later when the construction to be placed upon statutory provisions forbidding local discriminations is brought up. But it seems appropriate

⁸⁸ *Carstens Packing Co. v. O. & A. T. & S. F. Ry.*, 19 I. C. C. 218. W. R. R., 22 I. C. C. 77.

¹ See *Weber C. & I. Fair Assur.*

⁸⁹ See *Com'l Club of Salt Lake v. N. P.*, 17 I. C. C. 212.

to point out in this place that it is a principle in rate-making subject to all of the limitations which have been brought out in this chapter, and that it has therefore a very limited operation. However much this theory may have appealed to some economists who have applied their theories of what is for the best interests of society to the railroad problem, it has very little weight with the lawyers who have had to do with the question.² "It is not the duty of a carrier to regulate markets. If by reason of competition in transportation or the condition of markets a carrier sees fit to move traffic at very low rates in order to participate in the business, that may be done and often is done, but that is a very different matter from compelling it to reduce all its rates to equalize competition between shippers from different fields of supply and by different and unrelated routes."³

§ 463. Limitations upon the Commission.

The Commission has no power to substitute a new and differing rate for a just and reasonable rate on the ground that it seems to it a wise policy to do so, or that the railroad had so conducted itself as to be estopped in the future from being entitled to receive a just and reasonable compensation for the service rendered.⁴ The authority

² Schoonmaker, Com., in *Rice v. Western N. Y. & Pa. R. R.*, 2 Int. Com. Rep. 298.

It is not the province of the Commission to overcome nature. *National Refining Co. v. Mo. P. Ry.*, 24 I. C. C. 315.

³ In comparing the transportation charges on wheat and on flour from Minneapolis to New York, in a controversy between Minneapolis and Buffalo millers, the commercial profits of the parties are neither controlling nor important. *Jennison Co. v. G. N. Ry.*, 18 I. C. C. 113.

It is not the function of the Com-

mission to make all producers on a parity in markets which they have in common. *Slider & Co. v. So. Ry.*, 24 I. C. C. 312.

⁴ *Southern P. Co. v. I. C. C.*, 219 U. S. 433, 55 L. ed. 283, 31 Sup. Ct. 288.

In a few States the courts have apparently adopted the theory of the economists, that a railroad should so fix its rates as to equalize the advantages of its patrons in so far as this will be for the good of the country. In *State v. Minneapolis & St. L. Ry.*, 80 Minn. 191, 83 N. W. 60 it was held that a commission in

granted to the Commission does not confer absolute or arbitrary power to act on any considerations which the Commission may deem best for the public, the shipper, and the carrier; its order must be based on transportation services, and it must disregard as well the demand of the shipper for protection from legitimate competition, domestic or foreign, for unlimited markets, or for the enforcement of equitable estoppels arising from a justifiable expectation that past rates will be maintained.⁵ And it should be said that the Commission has often insisted that it is not its function to equalize the profit and loss resulting from competing operations in different localities, by overcoming natural and commercial conditions with rate adjustments.⁶ The Commission has not recognized the right of a carrier to fix its rates to or from a given point on a higher level than they otherwise should be, in order to prevent one community from competing with another, or to keep the products of one community out of a territory, the wants of which may be fully supplied by another community.⁷

§ 464. Rates made from a commercial standpoint.

It is sometimes maintained by a shipper of one product

fixing rates might act upon the business policies which the railroads themselves have been accustomed to pursue in making rates. And in *Southern Ry. v. Atlanta Stove Works*, 128 Ga. 207, 57 S. E. 429, it was held that a commission is not precluded from considering the conditions affecting the markets it serves.

⁵ *Atchison, T. & S. F. v. I. C. C.*, 231 U. S. 736, 34 Sup. Ct. 316.

The general principle which the majority of courts are now laying down as the guide for all concerned seems to be that what is a reasonable rate depends upon the significance of that phrase at common law. South-

ern *Indiana R. R. v. Railroad Commission*, 172 Ind. 113, 87 N. E. 966. The question then is what, in view of all the facts affecting the movement of a commodity, is the amount which a carrier should obtain to recoup itself fully for the service it is rendering, having in mind the property it is employing in performing the transportation. *Morgan's L. & T. R. R. & S. S. Co. v. Railroad Commission*, 127 La. 635, 30 So. 83.

⁶ *Louisville Cotton Seed Products Co. v. L. & N. R. R.*, 26 I. C. C. 607.

⁷ *Indianapolis Freight Bureau v. C., C., C. & St. L. Ry.*, 26 I. C. C. 53.

which is competitive with another product that the rates should be adjusted so as to equalize the standing of the competitors. This has been argued before the Commission with great insistence several times, but never with real success. Thus in one case⁸ the contention was made that the rates upon live stock and dressed beef should be so adjusted that a packer in one part of the country might compete upon equal terms with a packer in another part. The Commission in its opinion pointed out that this was not a basis upon which the carrier could be compelled to make rates, if indeed the railroad ought ever to act upon such a principle to any extent. "It is evident, therefore, that relative rates cannot be adjusted from a purely commercial standpoint. In saying this it is not to be understood that the increased value of the product is not legitimately to be taken into account in fixing the rate, which is altogether a different proposition from that advanced by the complainants that the rates should be such as to equalize the standing of different producers in the business in the respective markets of the country. We are of opinion that in the fixing of relative rates upon articles strictly competitive, as these are, the proper relation should be determined from the cost of the service, and if the difference in this respect between two competitive articles can be ascertained, such rate should be fixed for each as corresponds to the cost of service. This is fair to the carrier, and we believe the manufacturer has a right to demand of the companies that such a relation of rates as to these articles should be maintained."⁹

§ 465. Rates should not equalize differences in value.

The railroad cannot by its rates equalize qualities of the same article between different producers. In *McGrew v.*

⁸ *Squire v. Michigan Central Ry.*, 3 Int. Com. Rep. 315, 4 I. C. C. Rep. 611.

⁹ Carriers are under no duty to

equalize rates, and, therefore, shippers have no right to demand that this shall be done. *W. Va. R. Co. v.*

B. & O. R. R., 26 I. C. C. 622.

Missouri Pacific Railway,¹⁰ the defendant contended that as coal from its mines at Rich Hill has less value for domestic purposes than Myrick coal it might equalize such difference in value by making a lower rate on Rich Hill coal. The complainant's cost of mining coal at Myrick is nearly 50 cents a ton more than it costs defendant to mine its coal at Rich Hill. The Commission, however, held that this difference in quality would not justify a difference in rate: "If difference in quality is to be equalized in favor of the defendant, why should not difference in cost of mining be equalized in favor of the complainant? When this complainant acquired his mine he knew that the value of this coal was greater for domestic purposes than that of Rich Hill, and the price of his mine may well have been fixed in view of that fact, but such an adjustment of rate as that put in force by the defendant entirely eliminates this element of value and might destroy the worth of complainant's property. If any such process of equalization is permissible defendant may absolutely dictate the comparative value of every mine and industry upon its road; and that such rates should be examined with closest scrutiny when resorted to by the carrier in its own favor."¹¹ And recently in *Philadelphia & Reading Railway v. Interstate Commerce Commission*,¹² when similar facts came before the federal courts for decision, it was laid down that a carrier is not justified in charging for the same or substantially similar coal-carrying service a higher rate for coal because, being of better quality and more easily mined, it can bear a higher rate.¹³

§ 466. Carriers not obliged to equalize disadvantages.

But while the equalization of advantage cannot be a chief factor in rate-fixing, it may legitimately be con-

¹⁰ 8 I. C. C. 630.

¹² 174 Fed. 687.

¹¹ Equalization by rates for freights of costs of production condemned. *Pittsburg Steel Co. v. L. S. & M. S. Ry.*, 27 I. C. C. 73.

¹³ Attempt to equalize assembling costs in competing districts also condemned. *Coke Producers' Ass'n v. B. & O. R. R.*, 27 I. C. C. 125.

sidered as one of the subordinate factors tending to lower the particular rate, and may be taken into account with the other factors enumerated in this chapter. A railroad company may have nothing to do with the principle of equalization, and shippers whose original disadvantages remain have no legal redress. "The complainants introduced considerable testimony to show the cost of producing corn and wheat in northwest Iowa, for the purpose of demonstrating that at the present rate it was not possible for the farmer in that section to embark in this industry at a profit. Very little has been said in reference to this aspect of the case upon the argument, and probably very little could be consistently said. If the farmer cannot, in a given locality, raise and ship produce to market at a profit upon the existing freight rate, that is usually no reason why the carrier should be compelled to accept less than a reasonable sum for its service."¹⁴ "It seems plain," said the Commission in a later case, "that the duty of the Commission is to establish just and fair transportation charges in so far as it can be done and allow rival creamery methods to operate under those charges; it should not establish a scale of rates with a view and for the purpose of fostering or discouraging either form of this industry."¹⁵

§ 467. Protection of natural advantage.

It is, therefore, not the function of the Commission to equalize commercial or economic conditions.¹⁶ The traffic

¹⁴ *Prouty, Com., in Grain Shippers' Ass'n v. Illinois Cent. R. R.*, 8 I. C. C. Rep. 158.

The interest of the consumer must be considered, as well as that of the producer. *Andy's Ridge Coal Co. v. So. Ry.*, 18 I. C. C. 405.

¹⁵ *Beatrice Creamery Co. v. I. C. Ry.*, 15 I. C. C. 109.

Commercial conditions considered in determining the question of the

relation of rates on flaxseed and linseed oil. *In re Advances on Flaxseed*, 25 I. C. C. 337.

¹⁶ *Boileau v. P. & L. E. R. R.*, 24 I. C. C. 129; *Chamber of Commerce of New York v. N. Y. C. & H. R. R.*, 24 I. C. C. 55; *Slider v. S. Ry.*, 24 I. C. C. 312; *In re Advances on Cooperage*, 24 I. C. C. 656; *Oklahoma Portland Cement Co. v. M., K. & T. Ry.*, 24 I. C. C. 158.

standpoint, not revenue standpoint, is that ordinarily to be considered in determining rates.¹⁷ Commercial conditions may be considered in connection with other factors that determine the reasonableness of a particular rate; but the adequacy of the revenue for the service performed by the carriers must take precedence over market conditions affecting the commodity transported.¹⁸ The alleged necessities of a certain traffic cannot be urged as a reason why the carriers should be required to maintain rates which were established to meet other conditions, and which the Commission finds to be unduly low to-day.¹⁹ Thus the difference in cost of production cannot be recognized as a basis for the adjustment of freight rates between different localities.²⁰ And it is not within the province of the Commission to adjust rates, merely to equalize market conditions.²¹ Indeed, it may be said that every city is entitled to advantages of its location, and cannot be deprived of it by differential rates.²² Subject to these qualifications, carriers are still permitted to adjust their rates, regulations, and practices with due regard to the circumstances and conditions confronting them and the natural currents and laws of trade and commerce.²³ The future may compel greater recognition of distance in the making of many rates, but the present business structure was not developed on that principle, and if a change is to be made it must be a gradual one.²⁴ But it is at least clearly established that a road should not carry the traffic of one city at less than the cost of service and thus unduly burden other traffic.²⁵

¹⁷ *In re Advances in Rates, Eastern Case*, 20 I. C. C. 243.

¹⁸ *Lindsay Bros. v. P. M. R. R.*, 25 I. C. C. 368.

¹⁹ *In re Advances on Flaxseed*, 25 I. C. C. 337.

²⁰ *Sheridan Chamber of Commerce v. C., B. & Q. R. R.*, 26 I. C. C. 638.

²¹ *Omaha Grain Exchange v. C., R. I. & P. Ry.*, 28 I. C. C. 680.

²² *Corporation Commission of N. C. v. N. & W. Ry.*, 19 I. C. C. 303.

²³ *Chickasaw Compress Co. v. Gulf, C. & S. F. Ry.*, 11 I. C. C. 187.

²⁴ *Chamber of Commerce of New York v. N. Y. C. & H. R. R. R.*, 24 I. C. C. 55.

²⁵ *Boileau v. P. & L. E. R. R.*, 24 I. C. C. 129.

§ 468. No right to build artificial markets.

It has been said again and again that the public interest is the first consideration in determining the reasonableness of a rate; but the rate must be reasonable with respect to the service actually performed, and not with respect to the service that could be performed, if the shipper permitted the carrier to select a market for him.²⁶ Where a plant has been established, and money invested on faith of certain rates and conditions, the carrier may not increase those rates to the serious disadvantage of such investment, without good cause or reason.²⁷ The mills, the industry and the investments, which have been induced by a rate adjustment, should not be destroyed by a rate adjustment, unless such action is absolutely necessary.²⁸ Rates long in effect as the result of experimenting ought not to be disturbed, unless the Commission is certain that justice requires it.²⁹ Where a particular industry has grown up under rates voluntarily established by carriers, these rates cannot be advanced without considering the effect upon that industry.³⁰ Rates cannot be established to shut out foreign products, for the purpose of protecting American industries.³¹ And, where it is the manifest purpose of an advance to secure to a railroad practical monopoly of the coal business for the mines on its line, the advance will not be allowed.³² And in general it may be said that the Commission has no power to equalize natural advantages or adopt policies directed to that end.³³ No order can be issued to overcome natural ad-

²⁶ *Pacific Coast Lumber Co. v. N. P. Ry.*, 14 I. C. C. 51; *Chamber of Commerce of Milwaukee v. C., R. I. & P. Ry.*, 15 I. C. C. 460.

²⁷ *Douglas & Co. v. C., R. I. & P. Ry.*, 16 I. C. C. 232.

²⁸ *Commercial Club of Superior v. G. N. Ry.*, 24 I. C. C. 96; *In re Transportation of Wool, Hides and Pelts*, 25 I. C. C. 185; *Mountain Ice Co. v. D., L. & W. R. R.*, 15 I. C. C. 305.

²⁹ *Florida Fruit & Vegetables Shippers v. A. C. L. R. R.*, 14 I. C. C. 476.

³⁰ *Joint Coal Rates to Clinton, Iowa*, 25 I. C. C. 179.

³¹ *Rates on Linseed Oil*, 26 I. C. C. 265.

³² *Meridan Fertilizer Co. v. V. S. & P. Ry.*, 26 I. C. C. 224.

³³ *Sioux City T. E. Co. v. C., M. & St. P. Ry.*, 27 I. C. C. 457.

vantages, by making differential rates designed to equalize advantages and disadvantages of location or manufacture.³⁴

§ 469. No equalization of patrons.

The profits of shippers are not a test of reasonableness of rates.³⁵ A railway may not impose unreasonable rates because the business of a shipper is so profitable he can pay it.³⁶ To base rates upon shipper's ability to pay is to base rates upon cost of production not cost of carriage; this is regulation of industries and commerce by railroads.³⁷ Investment made in an industrial enterprise in reliance upon an existing rate cannot act as a bar to the readjustment of rate structure.³⁸ The Commission cannot limit its view to operations of a single plant in passing upon a transportation charge.³⁹ Carriers cannot increase their revenues and foster industries reached by them, without regard to interests of patrons.⁴⁰ The contention sometimes is made, to be sure, that carriers should adjust their rates in a way to produce equality between the competitors in all markets. It must be apparent that it would be a useless task for the Commission, even if it had the power, to attempt to accomplish such a result. It would involve a careful research into all the circumstances surrounding the business of each locality, as questions of rent, rates of taxation, cost of labor, and many other things which suggest themselves. The evident result would be that there would have to be as many differently constructed rates as there are different localities.

§ 470. Equalization of advantage as a factor.

A theory of fixing rates which appeals to many econ-

³⁴ *W. Va. R. Co. v. B. & O. R. R.*, Western Case, 20 I. C. C. R. 307.
26 I. C. C. 622.

³⁵ *Truck Growers Ass'n v. A. C. L. R. R.*, 20 I. C. C. R. 190.

³⁶ *R. R. Com. of Kans. v. A., T. & S. F. Ry.*, 22 I. C. C. R. 407.

³⁷ *In re Advances in Rates*, Rate Cases, 26 I. C. C. 215.

³⁸ *Michigan Upper Peninsula Pig-iron Rates*, 26 I. C. C. 284.

³⁹ *Robinson Land & Lumber Co. v. M. & O. R. R.*, 26 I. C. C. 427.

⁴⁰ *Wichita Falls System Joint Coal*

omists, which is in fact a modification or special application of the rule for charging what the traffic will bear, is the theory that rates should be so fixed as to equalize the advantage of shippers and thus establish the conditions of business for the good of the whole country.⁴¹ It is in substance a sort of legal protection to struggling industries. Thus if wheat cannot be raised in Wyoming as cheaply as in Iowa, the rates from Wyoming to the seaboard should be correspondingly reduced; unless indeed it does not seem to the rate-fixers to be for the country's good that wheat should be raised in Wyoming. A practical objection to this doctrine will at once appear. It calls on the private individuals who happen to have power over rates to act in such a way as to subserve the public good, rather than their own advantage; and thus without election as legislators and without the responsibility of office, to perform one of the most difficult of legislative functions. Nor is it practically possible to fix rates entirely or principally on this theory.⁴² Rates for the transportation of property should be arrived at and based so far as practicable upon permanently continuing, fixed facts and conditions. The fluctuations of the markets of the country are so frequent, especially as to competitive articles, and oftentimes unexpected, that commercial considerations alone would not furnish a sufficiently stable and fixed rule for guidance in making a rate which ought to remain substantially permanent through all fluctuations.

§ 471. Passenger fares slightly affected by this principle.

Passenger schedules are usually made upon a mileage basis; there is little attempt in making them up to minimize the disadvantages of distances. But the principle is applied

⁴¹ The Act is not designed to give the Commission power to equalize opportunity. *Fort Arthurs B. of T. v. A. & S. Ry.*, 27 I. C. C. 403

⁴² The rates necessary to permit

growers to market their product at a reasonable profit are not the test of the justness of a transportation charge. *Florida Fruit & Vegetables Ass'n v. A. C. L. R. R.*, 17 I. C. C. 552.

to a very limited extent by the railroads; for example, suburban stations are sometimes grouped in zones. The principal illustration of this policy, if it be such, of equalizing passenger fares is the five cent fare customary in American municipalities for transportation in street cars whether the passenger rides for one block or ten miles. By this policy most land within a metropolitan district is brought within the benefit of this uniform fare, whatever may be its distance from the commercial centers. In justifying a consolidation of street railways, one Judge said:⁴³ "As a result, at the time the ordinance was adopted, the mileage of tracks increased from the previous aggregate of 110 miles to 142 miles, reaching every section of the city, with shorter and better routes, and furnishing 38 transfer points, with a universal transfer system,—a feature of especial value to the public, as a single fare of five cents gives a maximum length of ride more than double the old arrangement."

⁴³ *Milwaukee Electric Ry. v. Milwaukee*, 87 Fed. 577. See also *Washington Suburban Rates*, 26 I. C. C. 398, and cases cited.

See the *Commutation Rate Cases*, 21 I. C. C. 428, 27 I. C. C. 549.

CHAPTER XI

CLASSIFICATION OF COMMODITIES

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§ 480. Provisions of the Act.

The powers of the Commission specifically over classification are as recent as the Amendments of 1910. Previous to that time, classification could only be reached indirectly by attacking particular rates, either as unreasonable in themselves, or unjustly disproportionate. Only since 1906 has the Commission had power to fix rates absolutely, as a maximum; and, before that time, not having such power, it could not order changes in classification. As section 15 now runs, all rates, classifications, regulations and practices must be reasonable, the clause providing, as to classification, that it is thereby made the duty of all common carriers, subject to the provisions of the Act, to establish, observe, and enforce just and reasonable classifications of property for transportation, and reasonable and proper regulations affecting classifications, upon just and reasonable terms. Every unjust and unreasonable classification is prohibited and declared to be unlawful and the Commission has the same jurisdiction over these matters pertaining to rates as it has over the rates themselves. How differences in rating are saved from being considered discriminatory is discussed at large in Chapter XV.

§ 481. Prevalence of classification.

It is obvious that classification is in many businesses necessary for convenience in rate fixing, if for no other reason. And, indeed, some form of classification has been used from time immemorial. The first formal classification appears to have been made for toll roads, a system which was taken up naturally enough for canal tolls. For as soon as public service became a diversified business of large proportions, fairness to the patrons, as well as the convenience of the proprietors, required a classification as the basis of fixing rates. In modern times classification has become the very foundation of railroad rates, and the question of charge is primarily a question of into which class the goods shipped fall. It may be admitted that as

a classification gains in convenience, it loses in accuracy. No classification can be so minute as to conform to the differing varieties and conditions of traffic; and to separate differing grades or varieties of the same service into different classes with varying rates, even if it could be accomplished, would go far to defeat the real purpose of classification.

Topic A. Methods of Classification

§ 482. The meaning of classification.

Articles offered for transportation are classified in such a way as to bring together into one class such articles as can fairly be subjected to the same charge for carriage. A rate is then fixed for each class; not a difficult matter to schedule, since it has been found quite practicable to make the number of classes small.⁴⁴ This division of all possible articles of transportation into a few large classes as a basis for fixing the rates of carriage is what is known as classification of freights. It has been seen that it is probable that the necessity of the case forced a more or less crude classification upon carriers, as soon as carriage became a business. At all events, to-day the classification sheet is the basis upon which rate making is accomplished.⁴⁵ It is impossible even to enumerate all the articles that may be offered for transportation; still more so to frame a schedule showing an independent rate for every such article, and convey information of the schedule to every freight agent in such a form that he can quickly and accurately state a rate to the shipper. No modern carrier doing a large business, and especially no modern railroad, has undertaken to make rates without classification.

§ 483. Classification the method of establishing the rate.

The division of rates is accomplished by the classification of all articles into certain groups, and then fixing the

⁴⁴ Classification of articles should be plainly and clearly stated. *Pacific Coast Biscuit Co. v. S. P. & S. Ry.*, 20 I. C. C. 546.

⁴⁵ How the goods should be loaded considered in determining the proper classification. *Western Classification Case*, 25 I. C. C. 442.

rate for each group.⁴⁶ In classification, as will be seen, all the factors which have been discussed are considered; and it is by affecting the classification that such factors usually influence the particular rate.⁴⁷ The classes having been established, it is necessary next to determine the difference of rate between the classes, which may be effected by establishing a certain proportion between the various class rates. Finally, it remains to fix the charge according to the length of journey; and this may be done by fixing the rate between individual stations, or by grouping the stations, and fixing the rate with reference to an entire group. The character of the freight in question, the space it occupies in proportion to its weight, its intrinsic value to the shipper, and the risk to the carrier attending its transportation all have to be considered in determining whether a rate and classification are just and reasonable.

§ 484. The necessity of a proper classification.

Different articles require such different care in carriage that it would be unjust to fix a single rate that should apply to all articles carried. If a uniform rate were fixed for each pound carried, lead would be more expensive to ship than live stock; and if the rate were proportioned to bulk, a diamond would be carried more cheaply than fence-posts. It is necessary in order to distribute fairly among the shippers the burden of the entire schedule of rates to graduate the charge according to the nature of the article carried.⁴⁸ "Classification is recognized as a necessary method of adjusting the burdens of transportation

⁴⁶ When differentials are not disproportionate to differences in transportation conditions, higher rates on salt in packages than on salt in bulk are not unreasonable. *Gotttron Bros. Co. v. G. & W. R. R.*, 28 I. C. C. 38.

⁴⁷ A classification rule applying minimum weights on shipments in

corrugated paper or pulp cartons of certain sizes, when uncrated, instead of assessing on actual weights, is unreasonable. *Millinery Jobbers Ass'n v. American Express Co.*, 20 I. C. C. 498.

⁴⁸ *McDill, Com.*, in *F. Schumacher Milling Co. v. Chicago, R. I. & P. Ry.*, 6 I. C. C. Rep. 61.

equitably upon the various articles of traffic, in view of differing circumstances and conditions, and *but* for the necessity of such adjustment, considerations based alone on weight and distance of haul would probably determine rates, except as modified by competition. This method, while securing practical uniformity, would probably deprive many articles which are now important factors in commerce of the benefit of transportation to distant points." ⁴⁹

§ 485. Classification a convenience in rate fixing.

So many varieties of articles are carried by a modern carrier that it is a practical impossibility to consider each article by itself and fix a separate rate for its carriage. The attempt to frame separate rates, the Commission early said, has proved to be so cumbersome and inconvenient that the arrangement of freight into classes is deemed by the roads an essential part of rate-making, and is so treated by the Act to Regulate Commerce, which requires that the schedule of charges which every carrier must keep open to the public "shall contain the classification in force." ⁵⁰ Recently the Commission ordered that there should be a new classification of express rates, in which the standard or first-class rate shall be that on merchandise and to which there shall be but one great class of exceptions, or second class, consisting of articles of food and drink now carried under the term of "general specials." The rate on the latter class should be a certain percentage of the merchandise rate, and 75 per cent of the merchandise rate would yield a fair rate. While other rates were permitted to meet traffic needs and develop industries, it was said that all such rates should be based on conditions of service and should likewise be stated in percentages of the merchandise rate. ⁵¹

* Differences in loading justify 3 Int. Com. Rep. 460, 4 I. C. C. Rep.
differences in rate. Re Advances in 559.
Lemons, 23 I. C. C. 27.

⁵¹ In re Express Rates, 24 I. C. C. 380.

⁴⁹ *Coxe v. Lehigh Valley R. R.*, 380.

§ 486. History of classification in the United States.

Before the passage of the Interstate Commerce Act each railroad company had its own classification of commodities, and fixed its own rates; subject to occasional modification by pools and traffic agreements with connecting or competing roads. Upon the passage of the Act the inconvenience of this system became so obvious that partially successful efforts were made to bring about a uniform classification.⁵² The railroads operating in the northeastern part of the United States agreed upon a classification known as the Official Classification; those operating in the southeastern part of the United States agreed on a separate classification known as the Southern; and those in the west agreed on the Western Classification. The boundaries between the territory covered by these classifications respectively are formed by the Potomac, the Ohio, and the Mississippi Rivers. These classifications still prevail throughout the country, although subject to various modifications applying only in particular instances. This general statement requires some modification in detail. Thus goods shipped west from Chicago take the Western Classification at once and on the Pacific slope the Western Classification is modified. And every railroad, as will be seen, may make "commodity" rates for certain articles outside the classification, and thus each road may to a certain extent make an independent rating. For example, class rates to and from the Mississippi River crossings are published under special classifications.⁵³

⁵² *Thurber v. N. Y. C. & H. R. R.*, 2 Int. Com. Rep. 742, 3 I. C. C. 473.

For a discussion of circumstances justifying advanced rating in the classification of articles in Western Classification territory, see the *Western Classification Case*, 25 I. C. C. 442.

⁵³ *Texarkana Freight Bureau v.*

St. L., I. M. & S. Ry. Co., 28 I. C. C. 569.

There are other groupings to be noted; for example, lying north of the Ohio and extending west from Pittsburgh to the Mississippi River, but excluding the upper crossings and the northern corner of the State of Illinois, is the so-called Central

§ 487. Uniformity of classification attempted.

Various attempts have been made to secure one uniform classification throughout the country; and to this effort the Interstate Commerce Commission has lent its aid. The Commission has sought as far as practicable to secure the establishment throughout the country of a uniform classification of freight, believing it to be to the interest and advantage of both carriers and shippers.⁵⁴ But although at one time the effort seemed on the point of success, nothing came of it. It is doubtful whether it will ever become possible to frame one uniform classification. The differences of classification are in fact due to fundamentally different conditions in the three great divisions of the country; differences in density of population, in nature and purpose of traffic, in cost of construction and maintenance, which necessarily influence to some extent the classification of articles carried. Until there is greater uniformity of conditions, identity of classification is unlikely, and if secured would probably operate unjustly. While the nearest approximation to uniformity of classification is desirable, all agree that great caution should govern attempts to bring it about. The Commission has said to force it at once was undesirable, and while one dealer might be greatly benefited another might be ruined, and that the final adjustment of a uniform classification must necessarily be the arrangement of a number of compromises. And it was said in *Pyle v. East Tennessee, Virginia & Georgia Railroad Co.*⁵⁵ that occasional inequalities of rate, and slight and occasional differences in the rates charged would not prove that the whole system is wrong and that when comparison is attempted to be made of classification and rates, different conditions of transportation cannot be ig-

Freight Association territory. Commercial Club of Duluth v. B. & O. R. R. Co., 27 I. C. C. 639.

gle Co. v. Duluth, S. S. & A. Ry., 10 I. C. C. Rep. 489.

⁵⁴ Yeomans, Com., in Duluth Shin-

⁵⁵ 1 Int. Com. Rep. 770, 1 I C. C. Rep. 473.

nored.⁵⁶ Very recently the Commission has spoken more hopefully of the possibility of a uniform classification, noting that the carriers are working upon it and Congress has it under advisement.⁵⁷

§ 488. Classification necessarily imperfect.

It is obvious, of course, that the fewer the classes created the more imperfect the classification will necessarily be. Since the very nature of classification is the grouping together of different things, it is not possible to secure exact accuracy of treatment for all the varieties included in the class; and the fixing of rates in this method therefore involves compromise, and can at best only approximate correctness.⁵⁸ As the Commission said, in one of the most exhaustive cases on this subject—*National Hay Association v. Lake Shore & Michigan Southern Railway*—“The making of railroad tariffs is simplified by classifying the great number of articles commonly offered for transportation and fixing rates for the different classes instead of making a separate rate for each commodity. In a classification such as the Official, which contains but six general classes, it is manifestly impossible to bring together in each class only such articles as resemble each other in the elements of character, use, value, volume, bulk, weight, risk and expense of handling, which have so often been referred to as governing conditions in freight classification. Besides these general considerations affecting classification, competition is often an important factor. Such competition includes not only that between carriers, but also that of a commodity produced in one section with the same commodity produced in another section, and sometimes the competition of one kind of traffic with another. Necessarily many articles must appear

⁵⁶ *McDill, Com.*, in *F. Schumacher Milling Co. v. Chicago, R. I. & P. R. R.*, 6 I. C. C. Rep. 61.

⁵⁷ *Boston Chamber of Commerce v. A., T. & S. F. R. R.*, 28 I. C. C. 230.

⁵⁸ *Proctor & Gamble Co. v. Cleveland, Cin., Chicago & St. L. Ry.*, 3 Int. Com. Rep. 131, 4 I. C. C. Rep. 87, per *Veasie, Com.*

together in a class which bear little relation to each other in all these respects, though some may be of like character while differing in bulk or in value, others have similar bulk while varying largely as to weight or volume, and still others present similarity in one or more of the elements mentioned, but have no common relation as to others. The best that can be done under such a scheme of classification is to place two or more articles possessing general similarity in the same class, and where an article is not analogous to any other to put that article in the class containing commodities which are most nearly related to it in general character and other essential respects.”⁵⁹

§ 489. Classification not unduly minute.

No classification can be so minute as to conform to the differing varieties and conditions of traffic; and to separate different grades or densities of the same article into different classes with varying rates, even if it could be accomplished, would go far to defeat the real purpose of classification. If the rate on an article is reasonable to those who ship the great bulk of that article in the form in which it is commonly prepared for transportation, that rate does not become unreasonable to the shipper of a small quantity of the same article, merely because the shipment is prepared in an uncommon form, and one which affords the carrier a greater profit per hundred pounds. This is particularly true when the preparation of that article in the more profitable form would impose some degree of hardship upon a large majority of shippers because of its greater expense; and for this among other reasons it was held that cotton compressed in a round bale, in which form it could be handled much more easily and occupied much less space than in the ordinary bale, was not necessarily for that reason entitled to a lower classification.⁶⁰

⁵⁹ 9 I. C. C. Rep. 264, 306.

C., C. & St. L. Ry., 11 I. C. C. Rep.

⁶⁰ Planter's Compress Co. v. C., 382.

And the Commission commended the railroads for placing in the same class all window shades, whether mounted or unmounted.⁶¹ It would seem that the classification should be no more minute than could be described in a reasonable general rule. A matter so extensive and difficult as classification of freights must evidently be mainly governed by general rules; this is indispensable to any system of classification at all.⁶² The alternative is a rate for every commodity separately, instead of a class rate for articles of enough similarity in some controlling features to be classed together.⁶³

§ 490. Extra class divisions.

The standard classification, which contains five or six classes, while sufficient for ordinary commodities, does not and in the nature of things cannot cover exceptional cases, and especially cases of especially difficult carriage. In order to cover such exceptional cases, it is the custom to give certain commodities a rating above the first class, such as "double first class rates," or even higher.⁶⁴ Furthermore, there is a continual tendency to differentiate commodities, and to seek a means of giving to some article a rate which falls between two successive class rates. This tendency has resulted in the creation of intra-class ratings; such as a rate "forty per cent less than third class." This tendency is of course opposed in its

⁶¹ *Veasie, Com.*, in *Page v. Delaware, L. & W. R. R.*, 6 I. C. C. Rep. 148, 168. But see *Interstate Com. Comm. v. Delaware, L. & W. R. R.*, 64 Fed. 723.

⁶² *Andrews Soap Co. v. P. C. & St. L. R. R.*, 3 Int. Com. Rep. 77, 4 I. C. C. Rep. 41.

⁶³ Classification cannot reflect minute variations in value. *W. E. Caldwell Co. v. C. I. & L. Ry.*, 20 I. C. C. R. 412.

⁶⁴ A classification will not be based

on variations in value, since the number of classes would be too large, and the refinement too subtle for practical operation, and on the evidence presented the Commission was not justified in withdrawing a particular commodity varying in value, density and dimensions with each bale, from the general class to which it belonged. *Forest City Freight Bureau v. Ann Arbor R. R.*, 18 I. C. C. 205.

fundamental principle to the whole theory of classification, and if given play enough would soon put an end to the system on which present rates are based; and it is therefore not to be commended as a general expedient. If it seems necessary in any particular case, it is probably because the difference in rates of the two classes concerned is unduly great.⁶⁵

§ 491. Commodity rates.

But, besides the extra class rates proper, every road has specially low rates for some staple commodities, below the lowest class rates, which are known as commodity rates. Commodity rates are special rates, which ought to be made with reference to all conditions surrounding transportation of the particular articles between the particular points.⁶⁶ The principle on which such rates are established is doubtless a sound one. The articles which are granted commodity rates are staples of comparatively low value, like grain, lumber, and salt, moving in great quantities over roads of which they form a large part of their traffic. A granger road, carrying great quantities of grain in bulk, is in an entirely different position as to traffic in grain from a road in another part of the country, carrying small quantities from time to time to the small consumer; and while the traffic of the latter road can be classified, that of the former requires special treatment. Each road, therefore, may establish commodity rates in such cases; subject to the limitation that the rate must not be unduly low, so as to cause a loss. A commodity

⁶⁵ As the Commission astutely said recently, it is difficult to see why, in a scientific schedule, Class A and Class 5 should be the same; the object of creating different classes is to apply different rates. *Iowa R. R. Comm'n v. Ariz. E. Ry.*, 28 I. C. C. 563.

⁶⁶ *Mississippi River Case*, 28 I. C. C. 47.

While a commodity rate may be a different rate from a class rate, it does not necessarily follow that it must be a lower rate, nor is it obligatory upon the carrier to thereby establish a lower rate. *Wheeling Corrugating Co. v. B. & O. R. R.*, 18 I. C. C. 125.

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must not be carried at such unremunerative rates as will impose burdens upon other articles transported to recoup loss incurred in carrying that commodity.⁶⁷

§ 492. Method of classification.

Classification in the United States, as matters are ordered to-day, is made by a committee appointed by the railroads operating within the territory for which the classification is to be prepared, who meet from time to time to prepare or revise the classification sheet. Classifications are adopted by this committee by majority vote, and are then published, and when published are binding on all the roads concerned. The printed schedule containing the classification of all articles for carriage is called the classification sheet. It has been insisted that ratings should be broad enough to meet general commercial demands and should not be indefinite.⁶⁸ And where both class and commodity rates on any commodity are in effect it is always held that the commodity rate, being specific, takes the article out of the classification and becomes the only lawful rate.⁶⁹

§ 493. Interpretation of the classification sheet.

The classification sheet becomes a document of interest to the public, and shippers are at once entitled to the benefit of its terms. It is therefore a document to which

⁶⁷ *Anthony Salt Co. v. Missouri Pac. Ry.*, 4 Int. Com. Rep. 1, 5 I. C. C. Rep. 299.

Class rates on heavy commodities are made to move the more or less limited shipments from place to place, and commodity rates to move large steady shipments. *James & Abbot Co. v. B. & M. R. R.*, 17 I. C. C. 273.

⁶⁸ *Sea Gull Specialty Co. v. Baltimore Steam Packet Co.*, 27 I. C. C. 267.

Canceling a commodity rate and

re-establishing a higher class rate in order to remove a discrimination and bring rates into proper relationship, held to be justified. In *re Advances on Apples*, 24 I. C. C. 38.

⁶⁹ *Central California Traction Co. v. Chicago, M. & St. P. Ry.*, 24 I. C. C. 550.

Sufficient reason not advanced for abolition of class rate and establishment of low commodity rate. *Volco Mfg. Co. v. A., T. & S. F. Ry.*, 28 I. C. C. 289.

the carrier cannot give such an interpretation as it desires. The interpretation is subject to the rules governing writings in general, and the carrier is bound by the classification sheet according to its ordinary legal interpretation. For example, it is a well-established rule that the publication of a commodity rate takes the commodity out of the class rate, within the description of which it would otherwise fall.⁷⁰ The classification is supposed to inform the persons engaged in that business in what classes the articles they handle are placed for transportation purposes, and it would fail to do this if instead of employing terms of designation in the sense familiar to themselves it made use of them in a sense fixed upon by persons engaged in an occupation altogether different, and which might to an expert in their own business be strange and misleading.⁷¹

Topic B. General Principles of Classifying

§ 494. Influences determining classification.

In ideal traffic conditions certain elements would be taken into account in establishing a freight rate. These, among others, would be the value of the commodity, the bulk of the commodity, the cost of service, the volume of traffic, etc. Under these conditions the witnesses rather thought that value might be a pretty important factor in determining the freight rate. Under actual conditions, while an attempt was made to regard these various considerations, as a rule the controlling influence was competition. Whatever traffic managers would be glad to do, at the present time they do not, and perhaps cannot, consider in the making of rates much beyond actual

⁷⁰ *Indianapolis Freight Bureau v. C., C. & St. L. Ry.*, 16 I. C. C. 341.

Rules for the intervention of classification sheets. See *Smith v. Gt. Northern Ry. Co.*, 15 N. D. 195, 107 N. W. 56.

⁷¹ *Hurlburt v. Lake Shore & M. S. R. R.*, 2 Int. Com. Rep. 81, 2 I. C. C. Rep. 122.

Results of making false classification. See *Illinois Central R. R. Co. v. Seitz*, 214 Ill. 350, 73 N. E. 585.

competitive conditions. In *Grain Shippers' Association v. Illinois Central Railroad*,⁷² Mr. Commissioner Prouty said: "Originally these various factors entered to an extent into the freight rate, and under their operation schemes of rates and classifications were built up. Those classifications and class rates serve in a measure as the basis of rates at the present time, having been gradually modified by the action of competitive forces." Following the same line of thought, Mr. Commissioner Veazie, in *Proctor & Gamble Company v. Cincinnati, Hamilton & Dayton Railway*,⁷³ pointed out, in speaking of the classification committee, that, "It should not be overlooked that their training has been largely from the railroad standpoint and on this account their error, if either way, is more liable to be in favor of high rates. That they should always be exactly right is more than any earthly tribunal ever attained."

§ 495. Adjustment of business to established classification.

Since the classification of freights is the result of long experience, and business has become adjusted to it, the classification and rates will not be disturbed unless it is made clear that there is some tangible inequality involved and a fairer adjustment of rates is shown. Due weight must also be given to the fact that the free movement of the commodity is an auxiliary to the production of a larger volume of traffic to the carriers.⁷⁴ The classification of many, if not most articles has been substantially the same since the Act took effect.⁷⁵ During all this time, and

⁷² 8 I. C. C. Rep. 158.

Elements of classification are considered in full in I. & S. Docket No. 76, 25 I. C. C. 472. *Kellogg Food Co. v. G. T. Ry. of Canada*, 26 I. C. C. 611.

⁷³ Int. Com. Rep. 131, 4 I. C. C. Rep. 87.

Preservation of classification calls

for the exercise of "the flexible limit of judgment which belongs to the power to fix rates." *Louisville & Nashville Railroad Coal and Coke Rates*, 26 I. C. C. 20.

⁷⁴ *Meridian Fertilizer Factory v. Texas & P. Ry.*, 26 I. C. C. 351.

⁷⁵ *Grain Shippers Ass'n v. I. C. Ry.*, 8 I. C. C. Rep. 158.

probably during a much longer time, traffic conditions and commercial conditions have been adjusting themselves to this relation of rates. Certainly this relation should not be disturbed until some intelligent opinion can be formed as to what should take the place of it. It is not enough to know that the present conditions are not ideal. It must further appear that something better is attainable. While it may be true that the tendency should be to eliminate commodity rates and work more nearly to a class basis, still the rates of this country have been built upon a different theory, and to apply that theory would be revolutionary and destructive of many legitimate business enterprises.⁷⁶ While every effort conducive to uniformity of classification is to be commended, it does not follow that that result should be attained by accepting as a standard a classification prescribing a rate which, when applied to a given commodity or territory, becomes unreasonable.⁷⁷

§ 496. Classification according to representations.

In determining the true classification of goods offered for carriage the carrier may act upon the shippers' representations as to the nature of the goods. This was neatly brought out in a case where a manufacturer claimed that his soap, which was advertised extensively as toilet soap, should be classed not as toilet soap but as laundry soap.⁷⁸ He claimed that his soap was a cheap soap, and competed in the market with laundry soap; but as it had been extensively advertised as toilet soap it was necessary to call it toilet soap in order to have the benefit of the advertising. The Commission held that the railroads were right in classifying the soap according to the representation of its manufacturer. Mr. Commissioner Schoomacher

⁷⁶ *United States Leather Co. v. S. Ry.*, 21 I. C. C. 323.

⁷⁷ *In re Advances on Locomotives*, 21 I. C. C. 103.

⁷⁸ *Andrews Soap Co. v. Pittsburgh, C. & St. L.*, 3 Int. Com. Rep. 77, 4 I. C. C. Rep. 41, per Schoomacher, Commissioner.

said: "The Commission is unable to see how it can properly or justly require carriers to analyze the freight offered to them, to ascertain its quality and its actual value, when those are claimed to differ from its trade designation and the price paid by the consumer. A rule of that kind would be altogether impracticable. The public is entitled to truthful representations respecting goods offered for sale. If an erroneous representation is essential to the sale of a commodity it is not inequitable that some burden should be a necessary consequence. When a manufacturer describes his article to the public for the purpose of making a market for it, he also so describes it for purposes of carriage, and it seems as reasonable that the carrier should have a right to accept the manufacturer's representation concerning his product as that the public should be influenced by it in the purchase of the article."⁷⁹

§ 497. Bases of classifying goods.

In *Myer v. Cleveland, Cincinnati, Chicago & St. Louis Railway*⁸⁰ the complainant, a manufacturer of hats, objected to the classification of hatters' furs as double first class. The Commission, comparing hatters' furs with the other articles classed in the same way, found that none of them "affords as desirable traffic as the one under consideration, and in only three or four instances is there any approach to this." Comparing with articles in the first class, they concluded that "but very few of them are as desirable freight as hatters' furs and fur scraps and cuttings, and that none of them are more so. No special reasons were shown why these two commodities should pay a higher rate than other similar commodities." In reply to this, the carrier contended that "one commodity

⁷⁹ If a certain brand of cleanser is to be transported as soda ash, it should be so designated. *Ford Co. v. M. C. R. R.*, 19 I. C. C. R. 507.

⁸⁰ 9 I. C. C. 78.

See also *Warner v. N. Y. C. & H. R. R. R.*, 4 I. C. C. 32, 3 Int. Com. Rep. 257.

should not be compared with another unless the two are competitive; hatters' furs cannot therefore be tested by dry-goods or boots and shoes," and counsel argued that the main element in the determination of a classification is "value of the service," or "what the traffic will bear." Mr. Commissioner Prouty, however, refused to follow this argument, saying: "Mr. Gill, Chairman of the Official Classification Committee, speaking both as a witness and as counsel for the defendants, asserts that the main element in the determination of a classification is 'value of service,' or 'what the traffic will bear.' There is undoubtedly much, we do not find it necessary to now inquire how much, truth in this contention of Mr. Gill; but it cannot be admitted that those are the only considerations to be observed. It has been repeatedly claimed by carriers and repeatedly held by the Commission that in the forming of a classification bulk, value, liability to damage, and similar elements affecting the desirability of the traffic should be considered, and that analogous articles should ordinarily be placed in the same class.⁸¹ Manifestly in determining what freight rates shall be borne by different commodities an attempt should be made to obtain a fair relation between those commodities, and a classification which utterly ignores all considerations of this kind or which utterly fails to give due weight to such considerations is unjust and unreasonable."

§ 498. Justification for making classification on railroads.

In the discussion of classification it is to be noticed that the question is not what classification the judges would make if they were acting as a committee to frame a schedule; the question is rather whether the classification adopted by the carrier can be justified. In the cases in which

⁸¹ Bulk, value, risk, weight, and form in which tendered, must be considered in framing classification.

Ford Co. v. M. C. R. R., 19 I. C. C. 507.

See also Page v. D., L. & W. Ry., 6 I. C. C. 548.

classification is discussed, therefore, the court has to determine not whether it could imagine a better classification, but whether it should overthrow the adopted classification as clearly unreasonable.⁸² Classification is not an exact science, nor may the rating accorded a particular article be determined alone by the yardstick, the scales and the dollar. The volume and desirability of the traffic, the hazard of carriage, and the possibility or probability of misrepresentation of the article are considerations of prime importance in classification. At best it is but a grouping, and when the approximation resulting from it is not found to cause the exaction of an unreasonable or a discriminatory charge it will not be disturbed.⁸³ It has been pointed out by the Commission that there are a great variety of factors which influence classification; and it is only necessary that there should be enough of them similar to make the kinship sufficient. Weight per cubic foot, intrinsic value per unit, form in which tendered, risk to the carrier, volume of the traffic, and regularity of the business—these and similar matters affecting transportation should all be considered.⁸⁴ Carriers, within proper limitations, may take competition into consideration in classifying freight. Competition that may be considered in proper cases not only includes that between carriers, but also that of the commodity produced in one section of the country with the same commodity produced in another section, and sometimes competition of one kind of traffic with another kind.⁸⁵

§ 499. Reasonableness of classification requisite.

As a practical matter, therefore, the reasonableness of a particular rate depends upon the reasonableness of

⁸² *Planters Compress Co. v. Cleveland, C., C. & St. L. Ry.*, 11 I. C. C. Rep. 382.

⁸³ *Forest City Freight Bureau v. Ann Arbor R. R.*, 18 I. C. C. 205.

⁸⁴ *Yawman & E. Mfg. Co. v. A., T. & S. F. Ry.*, 15 I. C. C. 260.

⁸⁵ *Metropolitan Paving Brick Co. v. Ann Arbor R. R.*, 17 I. C. C. 197.

classification. Manifestly in determining respective classification an attempt should be made to obtain a fair relation between the services rendered, and a classification which fails to do this is unreasonable. When the rate for a particular service is in question the decision primarily involves a comparison with other services as now classified. Classification by its very nature involves the relation of one service to all others, and such comparison is therefore essential in testing any scheme of classification. Classification furnishes the best index of reasonable rate for particular service.⁸⁶ If the schedule of rates as a whole is producing too much or too little this as has been seen can be determined with reasonable certainty upon well established principles; but whether the particular rates are proper ones it was conceded could not be determined by mere computation with any such degree of accuracy. If the returns on the whole schedule are too high there should be a general reduction of rates or if too low there should be a general advance; in neither case should a particular class be selected for benefit of reduction or the burden of advance. But granting that the whole returns from the schedule are reasonable, then the question as to the reasonableness of a particular rate is whether it is properly placed in a reasonable classification. A classification to be reasonable must not only put similar services in the same classes, but must make proportionate differences between the rates charged against the respective classes. Thus the law as to particular rating reverts to its original test of proportionate share of the proper burden. But granting that the existing classification constitutes a reasonable system, the question remains as to a particular service whether it is properly placed in that system.⁸⁷

⁸⁶ The character of an article is to be considered in determining its classification rating. *Western Classification Case*, 25 I. C. C. 442.

⁸⁷ In all classifications, public policy must be considered. *In re Advances on Coal to Lake Ports*, 22 I. C. C. R. 604.

§ 500. A proper rate involves reasonableness of classification.

It is the recognized legal duty of the carrier so to classify traffic and fix charges thereon that the burdens of transportation shall be reasonably and justly distributed among the articles they carry.⁸⁸ That is the governing principle of a freight classification, and it arises under the obligation imposed upon carriers by the statute not to charge unreasonable or unjust rates or to impose any unjust discrimination or undue prejudice in any respect whatsoever. It is evident therefore that even in cases where the need of additional revenue is apparent the carrier cannot arbitrarily select some one or more articles upon which to apply higher rates regardless of the relation which such article or articles bear to other commodities commonly offered for transportation.⁸⁹ A general advance or diminution of all freight rates involves a question only of the reasonableness of the return from the whole tariff schedule; and even an advance of rates for a whole class of commodities involves principally only a question of the reasonableness of the rate as a whole. But if the rate charged upon a particular commodity is in question, the decision involves a comparison with other commodities. It must be determined whether the commodity is properly classified in comparison with other commodities.

§ 501. Classification not determined by a particular commodity.

While as a general principle it is clear that each shipper in the case of any particular shipment is entitled to a rate no greater than is reasonable for that shipment, it is equally true that if a shipper complains of the *classification* of the goods he offers for shipment the justice of his complaint cannot be determined by considering merely the effect of

⁸⁸ *Page v. Delaware, L. & W. R. R.*, 4 Int. Com. Rep. 525, 6 I. C. C. Rep. 148.

⁸⁹ *National Hay Ass'n v. Lake Shore & M. S. Ry.*, 9 I. C. C. Rep. 264.

such classification on the rate charged for the particular shipment in question. Classification by its very nature involves the relation of one commodity to all others; and comparison with other commodities is therefore essential to any scheme of classification.⁹⁰ An attempt to reform a classification by a selection of isolated cases and single classes, and changing them without a study of the entire scheme, would be dangerous. The entire effect of a proposed change can only be known by comprehending the relation of each particular article or class to the combined scheme. Therefore, a complainant asking a change in classification, as in this case, with reference to a single group of articles, should be required to show a case of unjust discrimination or wrong done to procure a change.⁹¹

§ 502. Jurisdiction of the Commission.

Until the Commission got power to fix rates, the Supreme Court held that it had no power to order changes in classification.⁹² But now it is recognized that, if the Commission finds a classification of rates improper, it has power to take such action as the situation requires.⁹³ It was clear enough, after the changes in section 15 in 1906, that where classification controls rates, the Commission is empowered to pass upon all such practices affecting rates.⁹⁴ Indeed, under the amendment to section 1 of 1910, giving it control of freight classification, it has power to determine the reasonableness of differences that are made be-

⁹⁰ *F. Schumacher Milling Co. v. Chicago, R. I. & P. R. R.*, 6 I. C. C. Rep. 61.

⁹¹ See also *Page v. Delaware, L. & W. R. R.*, 6 I. C. C. Rep. 548, citing *Eau Claire Board of Trade v. Chicago, M. & St. P. R.*, 4 Int. Com. Rep. 65, 5 I. C. C. Rep. 264; *James v. Canadian P. R.*, 4 Int. Com. Rep. 274, 5 I. C. C. Rep. 612; *Raymond v. Chicago, M. & St. P. R.*, 1 Int. Com. Rep. 627, 1 I. C. C. Rep. 230; *Boards*

of Trade Union v. Chicago, M. & St. P. R., 1 Int. Com. Rep. 608, 1 I. C. C. Rep. 215.

⁹² *Interstate Commerce Commission v. L. S. & M. S. Ry.*, 202 U. S. 613, 50 L. ed. 1171, 26 Sup. Ct. 766.

⁹³ *Cincinnati, H. & D. R. R. v. Interstate Commerce Commission*, 206 U. S. 142, 51 L. ed. 995, 27 Sup. Ct. 648.

⁹⁴ *National Hay Ass'n v. M. C. R. R.*, 19 I. C. C. R. 34.

tween the rates on various kinds of commodities.⁹⁵ With its new powers, the Commission now has a large measure of supervision in all its details over the classification of freights.⁹⁶ There can be no question to-day, therefore, that the Commission has power to compel carriers to adopt classifications.⁹⁷ Classification will not be changed by Commission in absence of evidence that rate is unlawful, unless it fairly appears that a particular article is not rated with other articles, similar in value, weight, and other essential transportation qualities.⁹⁸ In fixing rates on competitive articles, the relation should be determined on the basis of difference in cost of service; and many of the other considerations entering into establishment of rates upon independent or isolated articles should be in large part eliminated.⁹⁹ A carrier was recently held justified in cancelling a low commodity rate, and establishing a higher class rate at a non-competitive point, where no good reason existed for extending the commodity rate effective at competitive points.¹ Where a complainant contends that the ratings in one classification system are unjust and unreasonable, a comparison of the ratings in a different classification is by no means a guide to the relative transportation charges, unless the class rates under the several classifications are also considered.²

§ 503. Relief from improper classifications.

Changes in classification affect revenues as much as changes in rates.³ In determining the proper classification of articles the following elements are considered by

⁹⁵ In re Advances on Coal to Lake Ports, 22 I. C. C. R. 604.

⁹⁶ Western Classification Case, 25 I. C. C. 442.

⁹⁷ Carnegie Board of Trade v. P. Co., 28 I. C. C. 123.

⁹⁸ In re Advances in Class and Commodity Rates, 25 I. C. C. 401.

⁹⁹ W. E. Caldwell Co. v. C. I. & L. Ry., 20 I. C. C. R. 412.

¹ Carstens Packing Co. v. O. & W. R. R., 22 I. C. C. R. 77.

² Milburn Wagon Co. v. L. S. & M. S. Ry., 22 I. C. C. R. 93.

³ Ass'n of Union Made Garments M'frs v. Chicago & N. W. R. R., 16 I. C. C. 405.

the Commission, according to what is now the leading case on the subject: Bulk, character of article, cost of service, desirability of the traffic, distinction in transportation conditions, ease of handling, expense of carriage, hazardousness, liability to waste or injury, loading, manner of packing, possibility or probability of false billing, risk, space occupied, tonnage, use, utilization of equipment, value of article, value of service, volume of traffic and weight.⁴ Classification, from its very nature and use, cannot be so minute as to do mathematically exact justice to every variety of commerce that may move.⁵ But, generally speaking, shippers are entitled to rates both relatively and inherently reasonable.⁶ The work of classification should be confined to classification as such, entirely separate from the question of rates or revenues of carriers.⁷ The character of the commodity is to be considered in determining the proper classification of articles.⁸ A total disregard of weight in transportation of locomotives under mileage basis is unfair to carriers and discriminatory as between shippers.⁹ A carrier may not properly look beyond the transportation to the ownership of the shipment as a basis for determining the applicability of its rates.¹⁰ And it is still more clear that the personality of consignee can afford no basis for a difference in rates.¹¹

§ 504. Low-grade commodities.

Various rulings on what are low-grade commodities, as these matters are generally considered, are collected here for the purpose of emphasis. Unfinished stone or granite

⁴ *Western Classification Case*, 25 I. C. C. 442.

⁵ *Klauer Mfg. Co. v. A., T. & S. F. Ry.*, 28 I. C. C. 508.

⁶ *Coke Producers Ass'n v. B. & O. Ry.*, 27 I. C. C. 125.

⁷ *In re Advances on Flaxseed*, 25 I. C. C. 337.

⁸ *Taylor Dry Goods Co. v. M. P. Ry.*, 28 I. C. C. 205.

⁹ *In re Advances in Rates on Locomotives and Tenders*, 21 I. C. C. R. 103.

¹⁰ *Export Shipping Co. v. Wabash R. R.*, 14 I. C. C. 437.

¹¹ *Sligo Iron Store Co. v. A., T. & S. F. Ry.*, 17 I. C. C. 139.

is a low-grade heavy commodity, and an advance in its rates was therefore held excessive.¹² Fertilizer is a low-grade commodity, requiring no special service, and should receive a low rate.¹³ Fuel wood is a low-grade commodity, and freight is a large item in its final cost.¹⁴ Brick is a very desirable traffic, possessing elements which seem to call for the making of low rates.¹⁵ Sand and gravel rates should be very low, as compared with other commodities.¹⁶ Salt is to be compared with cement, clay, brimstone, pig lead, and other low-grade commodities.¹⁷ Rates on cement should bear a relation to the scale of rates on lime and brick.¹⁸ Scrap-iron rates should not necessarily be fixed with a definite relation to the rates on pig iron or new rails.¹⁹ Cottonseed was held entitled to same rate as cottonseed oil; whether it is entitled to same rate as cottonseed meal and cake, was not decided.²⁰ Ordinarily the rate on malt is the same as that upon grain products, and this is sometimes the same as the grain rate and sometimes slightly higher.²¹ The Commission realizes that as American practice has become, the commodity rate plays a large part in the development of our commerce, and that this is a condition with which it must reckon.²²

§ 505. High-grade manufactures.

At the other extreme are high-grade manufactures, which may properly be charged proportionately more, as the following examples will show. For instance, rates on such difficult freights to handle safely as furniture are nec-

¹² *Sims v. M. & W. R. R.*, 26 I. C. C. 275.

¹³ *Meridan Fertilizer Co. v. V. S. & P. Ry.*, 26 I. C. C. 224.

¹⁴ *Rates on Fuel Wood, Sawdust, and Shavings*, 26 I. C. C. 254.

¹⁵ *Metropolitan Paving Brick Co. v. A. A. R. R.*, 17 I. C. C. 197.

¹⁶ *Rates on Sand to Houston, Tex.*, 26 I. C. C. 677.

¹⁷ *Gotttron Bros. Co. v. G. & W. R. R.*, 28 I. C. C. 38.

¹⁸ *Iowa-Minnesota Cement Rates*, 28 I. C. C. 477.

¹⁹ *Scrap-Iron Rates Between Duluth and Chicago*, 28 I. C. C. 467.

²⁰ *East St. Louis Cotton Oil Co. v. St. L. & S. F. R. R.*, 24 I. C. C. 588.

²¹ *Grain Rates in C. F. A. Territory*, 28 I. C. C. 549.

²² *Western Classification Case*, 25 I. C. C. 442.

essarily high.²³ So is the classification of such delicate machinery as motor cycles.²⁴ A contention that a rate on sash, doors, and blinds should be higher than on lumber was held not to justify an advance, as it presupposes the reasonableness of lumber rate, which is not shown.²⁵ While it was admitted that rates on wool may properly be higher than upon the live animal, it was said that it was difficult to justify present differences.²⁶ Paper and labels, being sufficiently like paper wrappers or printed wrapping paper, should be rated second class under provisions of the Western Classification.²⁷ The rate on window glass from Pittsburgh to Atlanta was held not unreasonable as compared with the rate on glazed sash.²⁸ As the cost of transportation in case of live stock and products of live stock is approximately the same, there should not be differences in classification materially affecting the rate.²⁹ The impression of the Commission is that rates on box shooks, laths, shingles, ties, and certain other rough products of lumber ordinarily do not exceed those on the lumber from which they are manufactured.³⁰ And the Commission will hesitate to revise by order the relationship of rates on kindred commodities.³¹

Topic C. Comparison of Commodities

§ 506. Elements in comparison of commodities.

As will have been noted in dealing with the cases throughout this chapter, classification is predicated upon bringing into the same rating articles which are sufficiently similar for transportation purposes to justify their carriage at

²³ Furniture Rates in the Northwest, 26 I. C. C. 655.

²⁴ Griffing v. C. & N. W. Ry., 25 I. C. C. 134.

²⁵ Rates on Sash, Doors, and Blinds into Texas, 26 I. C. C. 116.

²⁶ In re Transportation of Wool, Hides, and Pelts, 23 I. C. C. R. 151.

²⁷ Pacific Creamery Co. v. S. P., 26 I. C. C. 578.

²⁸ Masee & Felton Lumber Co. v. S. Ry., 23 I. C. C. R. 110.

²⁹ Carstens Packing Co. v. O. & W. R. R., 22 I. C. C. R. 77.

³⁰ Sawyer & Austin Lumber Co. v. St. L., I. M. & S. Ry., 19 I. C. C. R. 141.

³¹ Board of T. of Chicago v. C. & A. Ry., 27 I. C. C. 530.

the same price. Freight classification is based upon the relations which commodities bear to each other in such respects as character, use, bulk, weight, value, tonnage or volume, risk, cost of carriage, ease of handling and controlling conditions caused by competition.³² It will be noticed that all these considerations, except the last, are concerned with the nature of the commodity itself; either its material qualities or its use. They affect either the cost or risk of carriage to the carrier, or the value of carriage to the shipper. It is plain, therefore, classification is a method of rate making based upon all the principles governing the establishment of particular rates³³ which are discussed in subsequent chapters.

§ 507. Like classification for similar goods.

The comparison commonly instituted is that between similar things, for the purpose of placing them in the same class. Thus the following articles have upon comparison been ordered by the Commission in the same class: envelopes for correspondence and merchandise envelopes,³⁴ celery with egg plant,³⁵ eggs with berries,³⁶ soap with groceries,³⁷ box shooks with laths,³⁸ bitters with ink³⁹ and cowpeas with grain,⁴⁰ to select a few examples from the great mass of rulings on these points. Counters and shelving,⁴¹ bagging and ties,⁴² spokes and lumber,⁴³ roofing paper

³² *Proctor & Gamble Co. v. Cincinnati, H. & D. Ry.*, 9 I. C. C. Rep. 440.

³³ See *Grain Shippers' Ass'n v. Illinois Central R. R.*, 8 I. C. C. Rep. 158.

³⁴ *Wolf Brothers v. Allegheny Valley R. R.*, 7 I. C. C. Rep. 40.

³⁵ *Tecumseh Celery Co. v. Cincinnati, J. & M. Ry.*, 4 Int. Com. Rep. 318, 5 I. C. C. Rep. 663.

³⁶ *Brownell v. Columbus & C. M. R. R.*, 5 I. C. C. (O. S.) 638.

³⁷ *Pyle v. East Tenn., Va. & Ga. Ry.*, 1 I. C. C. 465.

³⁸ *Michigan Box Co. v. Flint & P. M. R. R.*, 6 I. C. C. Rep. 335.

³⁹ *Myers v. Pennsylvania Co.*, 2 Int. Com. Rep. 403, 2 I. C. C. Rep. 573.

⁴⁰ *Swaffield v. Atlantic Coast Line*, 10 I. C. C. Rep. 281.

⁴¹ *Ireland & Rollings v. St. L. & S. F. R. R.*, 22 I. C. C. R. 590.

⁴² *Corporation Commission of Oklahoma v. A. O. & W. R. R.*, 27 I. C. C. 210.

⁴³ *Eastern Wheel M'frs Ass'n v. A. & V. Ry.*, 27 I. C. C. 370.

and roofing felt,⁴⁴ percolators and coffee pots,⁴⁵ addressing machines and multigraphs,⁴⁶ speedometers and cash registers,⁴⁷ motor cycles and bicycles.⁴⁸

§ 508. Different classification for dissimilar goods.

Unlike things may be compared to determine the correctness of the classification of one of them. With so few classes into which all commodities must be placed, it is obvious that not all articles in a single class will be similar in their nature; and unlike things may after comparison be held to belong in the same class. More commonly, because of the unlikeness, they will be held properly to be placed in different classes. Thus, upon a comparison, it was held by the Commission that there was such dissimilarity as to justify a different classification of lumber and oranges,⁴⁹ of soap and hay,⁵⁰ of cowpeas and fertilizers,⁵¹ of low-grade steam coal and more costly domestic grades,⁵² of salt and grain,⁵³ of patent medicines and lager beer,⁵⁴ of flour in barrels and breakfast foods in packages,⁵⁵ of agricultural implements and incubators,⁵⁶ of wools and fruits,⁵⁷ of copper and lumber.⁵⁸

§ 509. Certain commodities compared.

All this will be made plainer by the examination of certain cases where various commodities have been compared.

⁴⁴ Barrett Mfg. Co. v. C., M. & St. P. Ry., 20 I. C. C. 79.

⁴⁵ Landers, Frary & Clark v. A., T. & S. F. Ry., 17 I. C. C. 511.

⁴⁶ Pacific Stationery & Printing Co. v. O. W. R. R. & N., 24 I. C. C. 290.

⁴⁷ Stewart & Clark Mfg. Co. v. A., T. & S. F. Ry., 26 I. C. C. 361.

⁴⁸ Motorcycle M'frs Ass'n v. B. & O. R. R., 26 I. C. C. 127.

⁴⁹ Tift v. So. Ry., 10 I. C. C. 548.

⁵⁰ Proctor & Gamble Co. v. Cincinnati H. & D. Ry., 9 I. C. C. Rep. 440.

⁵¹ Swaffield v. Atlantic Coast Line, 10 I. C. C. Rep. 281.

⁵² Com. v. Louisville & N. R. R. (Ky.), 68 S. W. 1103.

⁵³ Anthony Salt Co. v. Missouri Pacific Ry., 4 Int. Com. Rep. 1.

⁵⁴ Myers v. Pennsylvania R. R., 2 Int. Com. Rep. 403, 2 I. C. C. Rep. 573.

⁵⁵ Schumacher Milling Co. v. Chicago, R. I. & P., 6 I. C. C. Rep. 61.

⁵⁶ Lee Co. v. I. C. R. R. Co., 28 I. C. C. 515.

⁵⁷ In re Transportation of Wool, Hides, and Pelts, 23 I. C. C. R. 151.

⁵⁸ Oregon & Washington Lumber v. U. P. R. R. Co., 14 I. C. C. 1.

Rates on milk should be lower than on cream.⁵⁹ Cake rate may be higher than bread rate but ought not to exceed regular merchandise rate.⁶⁰ As to steel and iron rate, the rates should be lower on nonfabricated than on fabricated.⁶¹ When wool and cotton compared, it will be seen that the greater value of wool justifies much higher rate.⁶² A higher rate on marble is not unreasonable as compared with rate on rough stone.⁶³ And a higher rate on high-pressure boilers than on low-pressure boilers was not condemned.⁶⁴ There may be different rates on winter and summer vegetables.⁶⁵ And it is improper to have the same rating on refined sugar, which is the most valuable product obtained from the cane, as on blackstrap, which is the residue of least value from the manufacture of sugar.⁶⁶ Cotton waste is entitled to transportation at less rates than cotton goods, being less in value and involving less risk and expense in transportation.⁶⁷ And among high-grade articles such valuable metals as copper are clearly included.⁶⁸ Rough lumber may properly be given a lower rate than dressed lumber.⁶⁹ And refrigerated fruit may properly be charged more than fruit transported under ordinary conditions.⁷⁰

§ 510. Provisions.

Eggs were held properly classed with fruit and other perishable articles of food in the case of *Brownell v.*

⁵⁹ *Bridgeman-Russel Co. v. G. N. Exp. Co.*, 22 I. C. C. R. 573.

⁶⁰ *Oak Grove Creamery v. Adams Express Co.*, 10 I. C. C. R. 454.

⁶¹ *Vulcan Iron Works Co. v. A., T. & S. F. Ry.*, 27 I. C. C. 468.

⁶² *In re Transportation of Wool, Hides, and Pelts*, 23 I. C. C. R. 151.

⁶³ *Cohen & Co. v. Mallory S. S. Co.*, 23 I. C. C. R. 374.

⁶⁴ *Smith-Booth-Ushier Co. v. L. S. & M. S. Ry.*, 23 I. C. C. R. 242.

⁶⁵ *City of Crawford v. C. & N. W. Ry.*, 25 I. C. C. 259.

⁶⁶ *Molasses Rates from Mobile*, 28 I. C. C. 666.

⁶⁷ *Riverside Mills v. Southern Railway*, 12 I. C. C. 388.

⁶⁸ *Michigan Copper & Brass Co. v. D. S. S. & A. Ry.*, 25 I. C. C. 357.

⁶⁹ *Farrar Lumber Co. v. N. C. & St. L. Ry.*, 25 I. C. C. 22.

⁷⁰ *Ozark Fruit Growers Ass'n v. St. Louis & S. F. R. R.*, 16 I. C. C. 106.

Columbus, Cincinnati & Midland Railway.⁷¹ What Mr. Commissioner McDill said as to the egg has its significance in general: "The egg is a delicate and perishable commodity. Though methods adopted for its preservation retard the decomposition to which it is subject, they do not prevent the article from taking on that musty and strong flavor so often noticed in 'stored eggs.' While not as perishable as the small fruits mentioned, yet, considering the delay which is necessary in the accumulation of sufficient lots for sale or sending to market, its inherent liability to early decay, and the fact that 'fresh eggs' are commonly held to be an indispensable food article in every household, it must be deemed sufficiently perishable to be classed with articles of that character. In the official classification eggs, any quantity, are classed as low as berries in carloads, fruit in carloads, not otherwise specified, and butter and cheese in any quantity; and they are given a lower class than poultry, game, peaches, or oysters, not in the shell. These commodities, though diverse in character, are all perishable food products and particularly subject to deterioration after short lapses of time and under climatic influences. Considered as a perishable article eggs cannot be deemed to have an unfavorable classification; they are classed lower than some, and no higher than any, of the articles above mentioned."⁷²

§ 511. Groceries.

A comparison of soap with other articles commonly sold by grocers was thus made by the Commission:⁷³ "The fifth

⁷¹ 4 Int. Com. Rep. 285, 5 I. C. C. Rep. 638.

⁷² Import rates on blackstrap molasses from New Orleans compared with salt, petroleum and its products, clay, pig lead, magnesite, chrome ore, hemp or jute waste, brewer's rice, and sisal. Molasses Rates from Mobile, 28 I. C. C. 666.

⁷³ Proctor & Gamble Co. v. Cincinnati H. & D. Ry., 9 I. C. C. Rep. 440, per Knapp, chairman.

See Thurber v. N. Y. C. & H. R. R., 2 Int. Com. Rep. 742, 3 I. C. C. Rep. 473.

Evaporated milk, canned, compared with other canned goods and found, in view of the circumstances,

class of the Official Classification contains over 2,000 articles, and includes soap and many other grocery articles, such as canned fruits and vegetables, candles, cabbage, pickles, potatoes, pumpkins, parsnips, squash and turnips, chicory, citron, lemon and orange peel, desiccated cocoanut, coffee, fruit butters, jelly, sauce, soap and washing powders, macaroni, vermicelli, flour paste, mustard, olives, pickle or brine, soups and broths, sugar, syrup and tapioca. Numerous other articles sold by grocers or in general stores are also in the fifth or higher classes. Without some showing of discrimination against soap in its classification as compared with other articles of the same general character, or any special distinction appearing in favor of soap in either volume, value or controlling commercial considerations, we are unable to find simply because it is a desirable article of traffic for the railroads in the matter of earnings and ease of handling that it is unjust to retain it in Class 5 with other articles of like character, some of which are equally as attractive as soap from the standpoint of car revenue."⁷⁴

§ 512. Vegetables.

Celery was compared with other vegetables for table use, and it was concluded that it should be classified with such vegetables rather than with perishable fruits.⁷⁵ "It is a matter of general knowledge that during recent years, and especially since the change in classification mentioned in the complaint, celery has come into much more common use. Its production has greatly increased

to be entitled to the same rates. *Whiteland Canning Co. v. P. C. C. & St. L. Ry.*, 22 I. C. C. R. 261.

⁷⁴ Sugar and coffee are not like kinds of traffic within the meaning of section 2. *Traffic Ass'n of St. Louis Coffee Importers v. I. C. R. R. Co.*, 28 I. C. C. 484.

Classification of pepper in Western Classification territory not found un-

reasonable. *Tone Bros. v. I. C. R. R.*, 26 I. C. C. 279.

Canned peas should take same rate as canned goods of general mixture. *Empson Packing Co. v. C. N. Ry.*, 22 I. C. C. R. 268.

⁷⁵ *Veazie, Commissioner, in Tecumseh Celery Co. v. Cincinnati, J. & M. Ry.*, 4 Int. Com. Rep. 318, 5 I. C. C. Rep. 663.

and its market value has declined. It certainly is no more a table luxury than some of the vegetables which have a lower class in the Western Classification. As varied or qualified by the foregoing, the facts stated in the petition are found to be true, and we hold that the complainant is entitled to the relief claimed. For that portion of its line over which the Western Classification is in force the Wabash road should class celery with cauliflower, asparagus, lettuce, green peas, string beans, oyster plant, egg plant, and other vegetables enumerated in Class C of that classification, rather than with berries, peaches, grapes, and other fruits specified in Class III. thereof, and the defendants should transport celery from Tecumseh to Kansas City at no higher rate per carload than they charge for carrying a carload quantity of any of said vegetables named in Class C aforesaid.”⁷⁶

§ 513. Lumber.

Forest products not entirely manufactured have been compared and placed in the same class. Thus lumber and railroad ties should have the same classifications.⁷⁷ Box shooks should be classified with lumber, laths and shingles and hub blocks should be classed with lumber instead of with wagon materials.⁷⁸ The Commission has recently held it unjust, unreasonable, and discriminatory to force club-turned spokes to bear higher rates than are imposed for like service upon analogous wood articles

⁷⁶ Cantaloupes compared with peaches, vegetables, and water-melons. *Bahrenburg, Bro. & Co. v. A. C. L. R. R.*, 24 I. C. C. 560.

⁷⁷ *Reynolds v. Western N. Y. & P. Ry.*, 1 Int. Com. Rep. 688, 1 I. C. C. Rep. 393.

⁷⁸ *Michigan Box Co. v. Flint & P. M. R. R.*, 6 I. C. C. Rep. 335.

Such a low-grade traffic as pulp wood ordinarily takes a lower rate than lumber; but in this case, the

lumber rate being competitive, the rate on wood pulp prescribed on the lumber-rate basis. *Wisconsin Pulp Wood Co. v. G. N. Ry.*, 22 I. C. C. R. 594.

Hardwood lumber was not found by the Commission to be entitled to a lower rate than pine lumber. Adjustment under which both pine and hardwood take same rate, not disturbed. In re *Advances on Lumber*, 24 I. C. C. 686.

which move at lumber rates.⁷⁹ And when formerly shingles⁸⁰ were compared with other lumber products, it was held that they should be in the same class. "Generally speaking the demand for and use of shingles as building material are quite as important and general as for any other lumber product, and the necessity is equally as great that such product shall be charged only a reasonable and equitable rate for its transportation. Shingles being put up in bundles for shipment, the work of handling is facilitated so that no more, and perhaps even less, labor is required than for the handling of many other lumber products classed with and charged the same transportation rate as lumber, such as laths, shooks, sawdust, box and moulding material and other stuff of the regular dimensions. The weight of shingles that can be loaded in a car will also compare favorably with the above named and many other lumber products taking the lumber rate. No testimony has been submitted as to the relative values of these various products, but it may be assumed safely, that shingles are worth as much per carload as the average of articles taking the lumber rate. No claim has been made that there is any greater risk in shipping shingles than any other article included in the lumber classification."

§ 514. Bottled goods.

A comparison of articles shipped in glass was made, upon complaint of the proprietor of a patent medicine

⁷⁹ *Eastern Wheel M'frs Ass'n v. A. & V. Ry.*, 27 I. C. C. 370.

⁸⁰ *Yeomans, Com., in Duluth Shingle Co. v. Duluth, South Shore & Atlantic Ry.*, 10 I. C. C. Rep. 489.

The Commission has held it discriminatory to force wagon wood and plow beams, in the rough, to bear higher rates than are imposed for like service upon many analogous articles which move at lumber rates.

Sligo Iron Store Co. v. St. L. & S. F. R. R., 28 I. C. C. 616.

It is the Commission's impression that rates on box shooks, laths, shingles, ties and certain other rough products of lumber ordinarily do not exceed rate on the lumber from which they are manufactured. *Sawyer & Austin Lumber Co. v. St. L., I. M. & S. Ry.*, 19 I. C. C. R. 141.

who desired a lower classification. The Commission said:⁸¹ "By this classification it takes the rates of the other kinds of property in the class. These consist largely of articles in glass packed like the bitters in boxes for transportation. Among them are: acids, apple or fruit butter, bromine, cider, coffee condensed, drugs and medicines, honey, ink, liquors, or liquids, milk food, oils, paints, pickles, prunes, syrup, and a variety of others. There is no apparent injustice in classifying the bitters with such articles. And a rate that is reasonable for the class is reasonable for an article properly included in the class. The petitioners suffer no injustice, therefore, peculiar to themselves, from the classification of their goods. If the classification of their bitters should be changed the same reasons would compel a like change of a large number of similar articles."⁸²

§ 515. Dry goods.

Window shades and various articles of dry goods were thus compared.⁸³ "In the elements of bulk, weight and value, several of the dry-goods articles described in the table set out in the sixth finding as taking third class rates have greater similarity to a 23-dozen case of finished shades than exist between such a case of shades and the first-class articles mentioned in that table. There is, however, little analogy in uses or character between window shades and the dry-goods articles referred to. With the exception of lace curtains, these articles are dry goods in the piece; and lace curtains are in the category of ornamental house furnishings, while the window shade is regarded as a household necessity. But the fact that both shades and lace curtains are in the first class, the latter many times more valuable, is an element to be

⁸¹ *Myers v. Pennsylvania Co.*, 2 Int. Com. Rep. 403, 2 I. C. C. Rep. 573. ing on articles in bulk. *Western Classification Case*, 25 I. C. C. 442.

⁸² The rating on articles in glass may properly be higher than the rat-
⁸³ *Veazey, Com.*, in *Page v. Delaware, L. & W. R. R.*, 4 Int. Com. Rep. 525, 6 I. C. C. Rep. 148.

noted, though against this it must be considered that many incongruities are unavoidable when the carriers undertake, as they do by the Official Classification, to divide the great mass of freight articles into practically six classes; and the desirability of simplicity in the classification is a feature which should not be overlooked. The items of similar bulk and weight, less value and risk of carriage, and important volume of traffic, are all in the direction of giving to window shades a classification as low as that which is provided for window hollandes."⁸⁴

§ 516. Difference between commodities.

When articles are plainly different in character, they are rightly put in different classes. In a case where it was attempted to compare salt and grain⁸⁵ the Commission said that there was no sufficient similarity between salt and grain to make a comparison in any degree instructive. In a recent proceeding the complainant attacked the classification first class on wire brooms and brushes as unreasonable, compared with toilet brushes taking the same rates. Wire brushes are not intended for toilet use, and are a rough, heavy, low-priced product, made for the most part of unfinished hardwood blocks, brush wire and common wire nails and used for scrubbing and cleaning rough surfaces. These brushes and brooms are immune from damage in transit, and packed for shipment, weigh 38 lbs. per cubic foot; average value per cubic foot, \$6.15, while toilet brushes have an average value of about \$27.00 per cubic foot. Upon this showing the Commission held that wire brooms and brushes should take a lower rate than the finer class of brushes and brooms, and should be rated as third class.⁸⁶

⁸⁴ Mohair should not pay a higher rate than wool. *National Mohair Growers' Ass'n v. A., T. & S. F. Ry.*, 23 I. C. C. R. 180.

Cotton piece goods compared with

dry goods. *Taylor Dry Goods Co. v. M. P. Ry.*, 28 I. C. C. 205.

⁸⁵ *Anthony Salt Co. v. Missouri Pac. Ry.*, 4 Int. Com. Rep. 1, 43.

⁸⁶ *Forest City Freight Bureau v. Ann Arbor R. R.*, 13 I. C. C. 109.

§ 517. Raw material and manufactured products.

It was early held that a court would not uphold an order of the Commission to the effect that the same rate should be charged for the cheaper grade of window shades as for the most expensive.⁸⁷ But it has recently been decided that it is not undue and unreasonable discrimination against the Chicago packing house industries, on the part of the railroads, in making lower rate for manufactured packing house products than for live stock, on account of competition.⁸⁸ The general rule is that manufactured products bear higher rates than raw material; but there are some exceptions to this rule. As a traffic matter, the Commission realizes that the value of raw material and manufactured products substantially differs, and frequently the risk incident to transportation of latter is greater.⁸⁹ Maintaining a rate on cottonseed in excess of the rate concurrently charged on cottonseed oil, subjects the former commodity, and the shippers thereof, to undue prejudice and disadvantage.⁹⁰ Staves are a manufactured product, and should not take a lower rating than lumber.⁹¹ The rate on malt may properly be higher than the rate on the barley from which it is manufactured.⁹² The rate on plain wire entering into manufacture of spring beds should be lower than the rate on spring beds.⁹³ Sulphuric acid is strictly a raw material in the manufacture of fertilizer, and distinctly lower rates should be applied to its transportation than upon the manufactured fertilizer.⁹⁴ While the manufactured product commonly takes a higher rate than the raw material it has been held that the

⁸⁷ *Interstate Commerce Comm. v. D., L. & W. Ry.*, 64 Fed. 723.

⁸⁸ *Interstate Commerce Comm. v. Chicago Gt. W. Ry.*, 209 U. S. 108, 52 L. ed. 705, 28 Sup. Ct. 493.

⁸⁹ *East St. Louis Cotton Oil Co. v. St. L. & S. F. R. R.*, 20 I. C. C. R. 37.

⁹⁰ *Louisville Cotton Seed Products Co. v. L. & N. R. R.*, 26 I. C. C. 607.

⁹¹ *Holland Blow Stave Co. v. A. C. L. R. R.*, 27 I. C. C. 488.

⁹² *Texas Brewing Co. v. A., T. & S. F. Ry.*, 21 I. C. C. R. 171.

⁹³ *Leggett & Platt Spring Bed & Mfg. Co. v. M. P. Ry.*, 22 I. C. C. R. 513.

⁹⁴ *International Agricultural Corporation v. L. & N. R. R.*, 22 I. C. C. R. 488.

maintenance of a parity of rates on wheat and flour tends to equalize conditions at all points at which flour-milling industries exist, and seems to be a sound rate policy.⁹⁵ There is no justification, however, for higher rates on wheat than on flour; and an arrangement similar to that proposed at Chicago should be made effective on wheat milled at Lockport.⁹⁶ Likewise it has been held that the same rate on petroleum and its products, is not improper.⁹⁷ The general principle is, however, usually respected to the effect that the carrier may make reasonable differentials between rates on raw material and articles manufactured therefrom.⁹⁸ Nothing is better established than that a manufactured article usually should take higher rating than the raw materials from which they are made.⁹⁹

Topic D. Differences between Commodities Carried

§ 518. Classification based on the package.

It seems to be true as a general principle that a shipper should be left free to ship in such package as suits his convenience, and therefore that a classification based on kind or size of package is improper. So where the carriers attempted to classify eggs carried in "returnable cases,"¹ that is, cases substantially built and comparatively expensive, lower than eggs carried in cheaper cases, though as a matter of fact the cheaper cases served their purpose equally well and caused no additional trouble or expense to the carrier, the Commission held the proposed classification invalid. A shipper, the Commission said, should not be subjected to unnecessary restrictions as to the kind of case he should use. And the Commission is equally

⁹⁵ Bulte Milling Co. v. C. & A. R. R., 15 I. C. C. 351.

⁹⁶ National Refining Co. v. C., C., & St. L. Ry., 20 I. C. C. R. R. 649.

⁹⁷ Electric Malting Co. v. A., T. & S. F. Ry., 23 I. C. C. R. 378.

⁹⁸ Eastern Wheel M'frs Ass'n v. A. & V. Ry., 27 I. C. C. 370.

⁹⁹ Bulte Milling Co. v. C. & A. R. R., 15 I. C. C. 351.

¹ Rhode Island E. & B. Co. v. Lake Shore & M. S. Ry., 4 Int. Com. Rep. 512, 6 I. C. C. Rep. 176.

clear that a railroad should not make excessive charges against bulky and lengthy articles.² But of course a carrier can make higher rates for such freights than for goods of the average character in these respects.³

§ 519. Business expensive to handle.

Where the service is usually expensive to handle a relatively larger rate is plainly justifiable. So when perishable meats are forwarded a special equipment is required resulting in a higher rate. Where, however, no special equipment is necessary, as for lumber which may go by any kind of car without special equipment, the rate must be much lower. And although not perishable a much higher rate could be charged upon valuable ores than upon coal by reason of the additional risk of loss in transit. So if an article is bulky, out of usual proportion to its weight, as straw hats, a much higher rate per hundred pounds can be charged than for pig lead.⁴ So if goods are packed in convenient packages for handling, as hardware in casks, a lower rate can be made than for uncrated furniture.⁵ And, to reserve the most important illustration of this principle to the last, a much lower rate can be made for goods shipped in carload lots than for package freight by reason of the obvious economy of

² A barrel is a package, and brimstone in barrels would ordinarily be termed package shipments, as distinguished from loose brimstone in bulk, and be rated as such. *McLaughlin G. K. Co. v. Maine S. S. Co.*, 22 I. C. C. 108.

³ *Brunswick B. C. Co. v. Atchison, T. & S. F. R. R.*, 23 I. C. C. 395.

Classification is sometimes made with respect to the manner of packing of articles. *Metropolitan Paving Brick Co. v. A. A. R. R.*, 17 I. C. C. 197.

⁴ Weight in relation to bulk must be taken into consideration in fram-

ing classifications and rates. *Ford Co. v. M. C. R. R.*, 19 I. C. C. 507.

See also in relation to bulk as an element in classification. *Michigan Seating Co. v. G. I. W. Ry.*, 29 I. C. C. 123.

⁵ Charges may properly be made somewhat higher for transportation of show cases in crates than in boxes. *Wadell Show Case & Cabinet Co. v. M. C. R. R.*, 22 I. C. C. 106.

Weight per cubic foot enters into determination of proper classification. *Yawman & E. Mfg. Co. v. A., T. & S. F. Ry.*, 15 I. C. C. 260.

carrying through unbroken carloads. These matters would receive further discussion at present were it not that these differences are fully treated under the head of discrimination later on.

§ 520. Shipment in form more convenient for handling.

Where the form of package results in a saving of expense to the carrier by reason of greater convenience of handling, a higher classification for the less convenient form of shipment will be justified. In one case⁶ it appeared that iron pipe fittings shipped in cases from northern points to southern territory took second-class rates, but if shipped in casks, barrels or kegs a special iron rate, lower than the sixth-class rate, was applied on any quantity. The Commission pointed out that "the barrel package is preferably used in the ordinary course of business because of its comparative cheapness. Even at the same or approximately equal rates boxes would not ordinarily be used, except when the quantity to be separately packed is insufficient to fill a barrel. In such a case the goods can be placed in a keg without much inconvenience or additional expense, and it can hardly be considered burdensome to require that kind of package if shippers desire to forward small lots at the special iron rate. The carrier offers that rate to all persons and on all quantities, *provided* the articles are sent in packages of barrel form; otherwise a higher rate is charged. The lower rate is not allowed for some exceptional or expensive mode of shipment, but on the package long in general use and apparently favored by shippers irrespective of rates, because of its suitability for the purpose and the low cost for which it can be procured. As the choice is wholly with the shipper it cannot be a hardship for him,

⁶ *Trades League of Phila. v. P. W. & B. R. R.*, 8 I. C. C. Rep. 368.

The term knocked down in pieces, means that a machine must be

severed into all its component parts and these parts shipped as separate pieces. *United Refrigerator Ice Machine Co. v. C. & N. W. Ry.*, 28 I. C. C. 439.

under the circumstances disclosed, to pay the higher rate when he elects to pack his goods in cases." Upon the same ground the Commission has held that milk shipped in cans, by which method it could be carried more cheaply, ought, other things being equal, to have a lower rating than milk carried in bottles.⁷

§ 521. Perishable freight.

It is obvious that perishable freight may be placed in a higher class than non-perishable goods of the same general nature. It requires special care in the carriage, greater speed, and special equipment, and the risk of loss to the carrier is greater. The transportation of fruit is of this nature, and a high special classification is permissible.⁸ In a case which involved the classification of bananas, the Commission said: "The kind of service required in the transportation of bananas is a somewhat exacting one. While not usually carried under refrigeration, a special ventilated car is needed. They must be handled with great expedition and in point of fact the Southern does transport them from Charleston to Richmond and Lynchburg and intermediate points by an express freight service which approximates a passenger schedule. The liability to damage is considerable, and it appears that claims for damage are frequently made." So in the case of melons, the Commissioner said: "Melons being perishable, rapid transit and prompt delivery are of the first importance and where the carrier renders a special service a higher rate than for the carriage of ordinary freight is warranted. The defendants furnish special trains for the melon traffic

⁷ Milk Producers' Protective Ass'n v. Delaware, L. & W. R. R., 7 I. C. C. Rep. 92.

From a classification standpoint, the security of a package may with propriety be considered in fixing the rating. Western Classification Case, 25 I. C. C. 442.

⁸ Gardner v. Southern Ry., 10 I. C. C. Rep. 342.

That transportation of grapes entails special service may be a justification of advance. Western Fruit Jobbers' Ass'n v. C., R. I. & P. Ry. Co., 27 I. C. C. 417.

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and undertake to make quick movement and speedy delivery.”⁹

§ 522. Less than usual care required.

Conversely, where the commodity requires less than ordinary care that fact is to be considered in lowering its classification.¹⁰ “Coal is among the most desirable kinds of traffic. The reasons for this have been several times stated by the Commission and need not be repeated here in detail. The cost of receiving, transporting and delivering that commodity is less than in case of almost any other article of freight. Its value is not great, the hazard of loss in transit is insignificant, it is an article of universal necessity in daily life, and as a steam fuel it furnishes the basis of many other industries. Coal rates in this country are usually highly competitive, and this fact, together with its desirability as traffic, and the large quantities which are moved have produced on the average a very low rate.”¹¹

§ 523. Unusual care in handling required.

In regard to explosives the argument has been made that one-half of the rate on dynamite is for the transportation service, and the other half for risk or insurance.¹² And clearly a much higher rate on explosives is justified on account of risk of accident.¹³ Rates on explosives should vary according to the risk attending the transportation of each particular kind.¹⁴ Thus masurite, which is a

⁹ *Loud v. South Carolina Ry.*, 4 Int. Com. Rep. 205, 5 I. C. C. Rep. 529.

These observations do not apply exclusively to food stuffs; lime is a commodity requiring perishable-freight service. *Iowa-Minnesota Cement Rates*, 28 I. C. C. 477.

¹⁰ *Denison L. & P. Co. v. M., K. & T. Ry.*, 10 I. C. C. Rep. 337.

¹¹ *Central Y. P. Ass'n v. Illinois*

C. Ry., 10 I. C. C. Rep. 505, applies the same principles to lumber transportation.

¹² *Dupont de Nemours Powder Co. v. C. R. R. of N. J.*, 25 I. C. C. 19.

¹³ *U. S. v. W. & N. R. R.*, 26 I. C. C. 309.

¹⁴ *Blumenstein v. P. & R. Ry.*, 21 I. C. C. R. 90.

high explosive, but not dangerous to handle, should be accorded a lower rate than dynamite, the handling of which is attended with great danger.¹⁵ Oil in less than carload shipments is not a desirable traffic; there is more or less leakage, giving rise to damage claims on account of other commodities shipped in the same car which may be injured both by direct contact with the oil and by the odor therefrom; and it is, therefore, necessary to handle small, less than carload lots, in separate cars and on account of its inflammable nature extreme care must be exercised in its movement.¹⁶ Likewise a charge of third-class rates on raw tallow in barrels or other packages with cloth covers is not shown to be unreasonable, although the charge for such commodity in barrels or casks with wooden covers is fourth class, in view of the fact that the barrels when covered with cloth can be placed by the carriers in one position only during transit, and also because of the fact that on account of its disgusting character it endangers other traffic when reshipped.¹⁷

§ 524. Classification based on volume of business.

A difference in classification based on the amount of a shipment, or the number of shipments, where the amount does not lead to any economy of management on the part of the carrier, is not justifiable. Thus a difference of classification of surgical chairs and sewing machines, based on the fact that few surgical chairs and many sewing machines are offered for carriage, is improper.¹⁸ "The mere fact that one article, for example, sewing machines, is shipped 'in greater quantities' than surgical chairs, when each as a rule is shipped in less than carload quantities, and of no large difference in bulk, weight and value, and of no appreciable difference in expense of handling and of

¹⁵ *Masurite Explosive Co. v. Pittsburgh & L. E. R. Co.*, 11 I. C. C. 405.

¹⁶ *Marshall Oil Co. v. C. & N. W. Ry.*, 14 I. C. C. 210.

¹⁷ *Green Bay Soap Co. v. C., M. & St. P. Ry.*, 14 I. C. C. 609.

¹⁸ *Harvard Co. v. Pennsylvania Ry.*, 3 Int. Com. Rep. 257, 4 I. C. C. Rep. 212.

haul, that this alone should constitute in itself any reason why the former should enjoy lower rates or classification than the latter, merely for the reason that they are shipped 'in greater quantities,' is a doctrine to which we cannot give our assent. In such a case mere quantity, not measured by a recognized unit of quantity adapted to carriage and lessening the expense of handling and carriage, cannot be allowed to affect rates in the transportation of property. The small dealer is entitled to just and reasonable rates on his product, as much so as many and large dealers, and any discrimination between them in rates based upon the idea that the one class of persons makes many shipments while the other makes but few is unjust and unreasonable under the Act to Regulate Commerce. It is a discrimination in favor of one kind of traffic as against another in the vital matter of rates, and is unlawful." ¹⁹

§ 525. Large volume of traffic in a certain commodity.

But though such a difference as that just examined will not justify a difference in classification, the case is entirely different where the volume of traffic in a certain commodity is so great as to justify a certain special method of handling it. Thus the enormous traffic in grain in the west justifies a special classification for it; and so the vast traffic in lumber in Georgia should be considered in the classification of that commodity.²⁰ So the great volume of shipments of flour as compared with other cereal products justifies a lower classification of flour.²¹ The volume of traffic which may be considered, as has been seen, is the entire traffic in the commodity in question. It is not permissible to consider the amount of traffic furnished by a single shipper.²² "The

¹⁹ The only discrimination which can legally be made between a large shipment and a small one must be based upon the difference in the cost of service. *California Commercial Ass'n v. Wells, Fargo & Co.*, 14 I. C. C. 422.

²⁰ *Tift v. Southern Ry.*, 138 Fed. 753.

²¹ *Schumacher Milling Co. v. Chicago, R. I. & P. R. R.*, 6 I. C. C. Rep. 61.

²² *Warner v. N. Y. C. & H. R. R. R.*, 3 Int. Com. Rep. 74, 4 I. C. C. Rep. 32.

volume of traffic implies only the extent to which a particular article has become a subject of transportation, and does not imply that a large shipper of the same or like traffic can have any advantage over a shipper of smaller quantities. Like traffic of large shippers and of small shippers must have the same classification for carloads and the same for less than carloads." It is, therefore, fundamental with the Commission to-day that value and volume of tonnage is important in determining the necessity of establishing a commodity rate.²³

§ 526. Value of the goods as an element.

The element of value in the commodity transported forms a proper consideration to be taken into account in the establishment of rate, since the greater the value the greater the carrier's liability as an insurer of freight, and the greater, therefore, the risk to the carrier in the transportation. Since the risk is greater, the cost of carriage increases by the amount of compensation for the greater risk; and it is, therefore, proper to give more valuable goods a higher classification than less valuable goods.²⁴ But the increased rating given to articles because of greater value must be not much more than is proper for the increased risk; when value is brought in as an element in classification, the classification cannot, nevertheless, be determined arbitrarily. "Value is undoubtedly an element which should be considered in the fixing of rates. It is often a most important element, but plainly cannot be made an arbitrary standard independent of all other considerations." ²⁵

²³ *Tone Bros. v. I. C. R. R.*, 26 I. C. C. 279.

²⁴ *Howell v. New York, L. E. & W. R. R.*, 2 Int. Com. Rep. 162, 2 I. C. C. 272.

Value must be taken into consideration in framing classifications and rates. *Ford Co. v. M. C. R.*, 19 I. C. C. 507.

Market value of commodity considered in determining classification.

Nucoa Butter Co. v. E. R. R., 20 I. C. C. 174.

²⁵ *Prouty, Com., in Grain Shippers' Ass'n v. Illinois Cent. R. R.*, 8 I. C. C. Rep. 158.

Value as element in determining

§ 527. Different classification of coals.

Upon the ground of difference in value a different classification of bituminous and anthracite coal has often been justified.²⁶ "Carriers in making separate classifications, or rates for different coals, take into consideration, not only the expense of transportation, but the value of the freight and worth of the transportation to the shipper; the exceptional qualities which fit the more valuable anthracite for domestic and special uses and cause its large consumption in less distant markets; the shorter distance from the mines to the principal markets rendering the transportation proportionately more expensive, and the necessity for so apportioning the transportation charges between the anthracite of different sizes and values that the more valuable may bear the greater charge."²⁷ Therefore, in a recent proceeding it was remarked that rates on bituminous coal, being generally lower than on anthracite coal, a rate on anthracite coal, which was higher than the rate on bituminous coal on another road was not to be held unreasonable.²⁸

§ 528. Bases of comparing values of goods.

The bases of comparing commodities may be seen more clearly by still other illustrations. In the past the same rate was applied on grain and the products manufactured from grain; of late the rate upon the product has been somewhat higher, and a separate rate provided for articles known as by-products.²⁹ In the South manufactured products and crude products are still often rated alike.³⁰

rating. *Barr Chemical Works v. P. & R. Ry.*, 20 I. C. C. 77.

The Commission commends the idea to the consideration of the carriers. *Union Pacific Tea Co. v. Pa. R. R.*, 14 I. C. C. 545.

²⁶ *Cox Bros. & Co. v. L. V. Ry. Co.*, 3 Int. Com. Rep. 460, 4 I. C. C. Rep. 535.

²⁷ Smithing coal, being of greater

value, may properly be charged higher rate than ordinary bituminous coal. *Sligo Iron Store Co. v. U. P. R. R. Co.*, 19 I. C. C. R. 527.

²⁸ *Meeker & Co. v. L. V. R. R. Co.*, 21 I. C. C. 129.

²⁹ Grain Rates in C. F. A. Territory, 28 I. C. C. 549.

³⁰ *German Kali Works v. A., T. & S. F. Ry. Co.*, 28 I. C. C. 223.

A classification could not be based on the value of a particular shipment, since the number of classes would be too large, and the refinement too subtle, for practical operation, and on the evidence presented the Commission was not justified in withdrawing a particular commodity varying in value, density and dimensions with each other, from the general class to which it belonged.³¹ It is the class to which the shipment belongs which determines the matter of rating; thus brooms, as a manufactured article, should, in accordance with accepted principles, pay a rate higher than broom corn, which is raw material.³² Faced brick are relatively so much more expensive than the ordinary sorts, and the damage to them in transit would run into so much higher figures, that a higher classification is plainly justified.³³ And generally speaking due weight must be given to differences in value of commodities, and that difference is not limited by measure of difference in risk.³⁴ Thus a very low rate can be given on scrap tin plate, a refuse of little intrinsic value, invoice value being about \$5 per ton, as it can move only under a rate relatively low compared with other articles usually classed as junk.³⁵ The fact that sand is a low-grade commodity and gives rise to practically no claims for loss and damage, makes it a case where low earnings per ton per mile would be regarded as reasonably remunerative in other parts of the country.³⁶

§ 529. Differing value of some kind of freight.

As has been seen, classification is not to be made too minute; and in general a difference of value between articles of the same kind does not lead to a different classification based on value. Thus, flour or cotton or silver ore

³¹ *Forest City Freight Bureau v. Ann Arbor R. R. Co.*, 18 I. C. C. 205.

³² *Broom Rates to Colorado Points*, 28 I. C. C. 310.

³³ *James & A. Co. v. B. & M. R. R.*, 17 I. C. C. 273.

³⁴ *Union Tanning Co. v. S. Ry.*, 26 I. C. C. 159.

³⁵ *Vulcan Detinning Co. v. U. P. R. R. Co.*, 21 I. C. C. R. 93.

³⁶ *Rates on Sand to Houston, Tex.*, 26 I. C. C. 677.

would have the same classification, without regard to the quality and value of the particular shipments.³⁷ To this there are some exceptions; thus in the official classification a difference is, or was, made in the classification of electrotype plates, engravings, paintings and pictures, statuary, bronze or metal, and stereotype plates, where the limitation of value is based upon the net invoice and required to be so expressed in the shipping receipts by shippers. The classification also contained rules restricting to fixed sums the valuation of livestock, marble, granite, ores, antimony, calamine, copper, lead, silver, tin, or mica,—such valuation to be stated by the shipper in the shipping order or receipt; and the class rate is given only where the value is so restricted. But in general it would not be permissible to make a difference between articles of the same kind merely because of value. Where carriers have applied one rate to all automobiles, it is not possible for them to differentiate between machines of different values, and whether old or new, as there would be no place where a definite line could be drawn; and, under the circumstances, the Commission would not say that the placing of old and new automobiles in the same class is unreasonable.³⁸

Topic E. Carload and L. C. L.

§ 530. Different classification and rating.

A fundamental principle in all classification is that one rate shall be given when the goods are carried in carload lots, and a much higher rate when they are carried in less than carloads. This difference is legally proper; and the rate per 100 lbs. can be much less in C. L. lots than in L. C.

³⁷ *Page v. Delaware, L. & W. R. R.*, 6 I. C. C. Rep. 548.

See, however, *Interstate Com. v. Delaware, L. & W. R. R.*, 64 Fed. 723.

³⁸ *Whitcomb v. C. & N. W. Ry.*, 15 I. C. C. 27.

In accordance with established

law, classification properly may not be predicated upon the use to be made of an article; use may, however, be considered as evidence of value; value has a bearing upon rating in the classification. *Western Classification Case*, 25 I. C. C. 442.

L.³⁹ If a carload can be handled as a unit, in loading, transporting, and delivering, the cost to the carrier is obviously much less; and furthermore there is no waste through hauling a partly empty car, as must necessarily happen in many cases where less than carload lots are shipped. One idea in making the C. L. rates less than L. C. L. shipments is that the consignee will unload the former, while the railroad handles the latter.⁴⁰ The difference between carload and less-than-carload rates must be a reasonable one. It must not be so wide as to be destructive to competition between large and small dealers, especially upon articles of general and necessary use, and which, under existing conditions of trade, furnish a large volume of business to carriers.⁴¹ An excessive difference between the carload and less-than-carload rates on the same commodity results in an undue preference to the carload shipper.

§ 531. When difference in classification is required.

Generally speaking, carload ratings should be established whenever carload quantities are offered for shipment, and public interest requires this course.⁴² But, unless their rate is otherwise shown to be unreasonable, a shipper on C. L. rates cannot complain that there is not a higher L. C. L. rate.⁴³ Thus the Commission has recently held that there is no necessity for the establishment of a carload rate on champagne, if the present any-quantity rate is a reasonable rate for the transportation of that commodity in carloads.⁴⁴ Carloading rating asked on cotton piece goods was refused,⁴⁵ on ground that business

³⁹ *Harvard Co. v. Pennsylvania Ry.*, 3 Int. Com. Rep. 257, 4 I. C. C. Rep. 212.

⁴⁰ *Re Advances in Demurrage Charges*, 25 I. C. C. 314.

⁴¹ *Thurber v. New York C. & H. R. R. R.*, 2 Int. Com. Rep. 742, 3 I. C. C. Rep. 473.

⁴² *Western Classification Case*, 25 I. C. C. 442.

⁴³ *Woodward- B. Co. v. S. P., L. A., & S. L. Ry.*, 29 I. C. C. 664.

⁴⁴ *Schmidt & Peters, Inc., v. A., T. & S. F. Ry.*, 28 I. C. C. 376.

⁴⁵ *Taylor Dry Goods Co. v. M. P. Ry.*, 28 I. C. C. 205.

conditions in the territory had adapted themselves to existing any-quantity rates.⁴⁶ On the other hand, a tariff was lately held to be unreasonable because of failure to establish carload rating on automobile parts.⁴⁷ And, still later, a carload rating, with a minimum of 24,000 was ordered to be established by the Commission on smoking tobaccos.⁴⁸ Where carriers have in effect a uniform rate per 100 pounds for any quantity, which rate applies uniformly to all shippers, a different rate applied to carloads than that applied to less-than-carloads will not be ordered when such differential will have a tendency to increase the rate on less-than-carloads, and permit the large dealer to drive the smaller dealers out of the market, and cut off the consumers and small dealer from purchasing at distant markets in less-than-carload lots.⁴⁹ Generally speaking, therefore, if the carrier chooses to carry goods in less than carload lots at the same rate as carload lots, the shippers cannot complain unless their rates are unreasonable. And, indeed, under certain circumstances any quantity rates are clearly much better for all concerned.⁵⁰

§ 532. Minimum carloads.

The carload rate necessarily involves some standard for determining what shall constitute a carload; and this is usually established by fixing a minimum weight of the commodity as a carload. This must of course be fixed reasonably, and must not exceed the weight that can properly be loaded in the car provided. It is in the interest of economical transportation that cars containing light and bulky articles should be loaded as heavily as possible; and it is equally plain that a carrier can afford, to an extent, to decrease its rates in proportion as the loading

⁴⁶ See also *Duncan & Co. v. N. C. & St. L. Ry.*, 16 I. C. C. 590.

⁴⁷ *Auto Vehicle Co. v. C., M. & St. P. Ry.*, 21 I. C. C. R. 286.

⁴⁸ *Bagley & Co. v. P. M. R. R.*, 25 I. C. C. 698.

⁴⁹ *Brownell v. Columbus & C. M. R.*, 4 Int. Com. Rep. 285, 5 I. C. C.

638.

⁵⁰ *German Kali Works v. A., T. & S. F. Ry.*, 28 I. C. C. 223.

increases.⁵¹ A carrier in defining a carload and fixing the rate should furnish a car adapted to carry properly the quantity designated, and not put the shipper to any expense to fit up the car; this expense would seem to be in excess of the tariff rate and unlawful.⁵² It would manifestly be unjust, under any rule as to minimum loads or otherwise, to charge for weight not carried in a car which the carrier has furnished and in which on account of its size and the nature and bulk of the freight the required minimum cannot be loaded.⁵³ There may, of course, be some exceptions to such a rule in cases where the freight is extremely light in weight in comparison with its bulk, and of such character as to forbid close packing; but it has proper application to general freight which is usually capable of being shipped in bulk or in bales or boxes.⁵⁴

§ 533. Minimum carload regulations.

Like other regulations minimum arrangements should be as uniform as possible; if they are unduly numerous, the chief advantages are lost. Rules for minimum weights which cannot be invariably enforced, or which, if so enforced, are plainly prejudicial to any class of shippers, are not to be regarded as lawful.⁵⁵ In a recent proceeding, however, minimum rates for furniture were graduated according to the length of the car based upon 16,000 pounds for 36-foot equipment.⁵⁶ In the case of a tank car, it is to be noted, there is a natural minimum in the capacity of

⁵¹ *Montague & Co. v. A., T. & S. F. Ry.*, 17 I. C. C. 72.

⁵² *National Hay Ass'n v. Lake Shore & M. S. Ry.*, 9 I. C. C. Rep. 264.

⁵³ No commodity is loaded always to its exact minimum; the actual loading usually very considerably exceeds the minimum prescribed; the same thing is to a degree true of baled wool. In *re Wool, Hides, and Pelts*, 25 I. C. C. 185.

⁵⁴ There is no justification for a carload minimum of twice the weight the commodity will ordinarily load. *Barnard Co. v. C., M. & St. P. Ry.*, 26 I. C. C. 91.

⁵⁵ *Suffern, Hunt & Co. v. Indiana, D. & W. Ry.*, 7 I. C. C. Rep. 255.

⁵⁶ *Commodity Rates Between Missouri River Points*, 28 I. C. C. 265.

the tank itself.⁵⁷ A minimum as high as the product can be carried under most advantageous circumstances, with a comparatively low rate, is, it seems, best for shipper.⁵⁸ It is not a sufficient reason for denial of a reasonable minimum weight for single-deck cars to establish the fact that the shipper might be able to obtain a reasonable minimum by ordering double-deck cars, when there are no facilities for loading double-deck cars.⁵⁹ It is perhaps needless to state that the carload rate is always charged in one contingency, in observance of a rule that the amount charged for less than a carload of freight shall not exceed charges on a minimum carload weight of the article.⁶⁰

§ 534. Mixed carloads.

Mixed carloads of articles of the same class and the same general nature may receive carload rates. The liberalization of mixtures is in the interest of the whole public; they result in a better utilization of car space, lessen demands upon terminal properties, decrease expense of operation, and facilitate movement of freight.⁶¹ Thus a mixed carload of celery and cauliflower, vegetables entitled to the same classification, should receive carload rates; any classification which interferes with the reasonable freedom of the shipper in this respect is improper.⁶² "Examination of the tariff providing for mixed carloads of green fruit shows that bananas and pineapples may go as a mixed carload, and that lemons and bananas mixed take the carload rate; and that pineapples may be mixed in a carload with almost any other kind of fruit therein specified except lemons and oranges. As bananas and pineapples may be mixed and lemons and bananas may be mixed,

⁵⁷ *Rates on Asphalt & Asphaltum*, 26 I. C. C. 614.

⁵⁸ *Ponchatoula Farmers' Ass'n v. I. C. R. R.*, 19 I. C. C. 513.

⁵⁹ *Kibbe v. St. L., B. & M. Ry.*, 25 I. C. C. 661.

⁶⁰ *American Brake Shoe & Foundry*

Co. v. A. G. S. R. R., 26 I. C. C. 446.

⁶¹ *Marshall Oil Co. v. C. & N. W. Ry.*, 26 I. C. C. 575.

⁶² *Tecumseh Celery Co. v. Cincinnati, J. & M. Ry.*, 4 Int. Com. Rep. 318, 5 I. C. C. Rep. 663.

it is difficult to see why the complaint is not correct in contending that lemons, bananas and pineapples may be mixed in one carload and carried at the carload rate, and yet technically lemons and pineapples cannot be forwarded together in a carload and receive the benefit of the carload charge under the present classification.”⁶³ It might be added that it is an almost universal rule that where a package contains articles taking different rate the entire package goes at the rate applicable to the highest rated article.⁶⁴

§ 535. Shipment in form permitting greater carload.

On the same principle it would seem that if goods are so compactly shipped that more can be carried in a single car, a lower classification should be given them. This was claimed by the complainant in the case of the Planters' Compress Company v. Cleveland, Cincinnati, Chicago & St. Louis Railway.⁶⁵ The complainant offered for carriage round bales of cotton so closely compressed and in such a form that twice as much cotton could be loaded and carried in a single car as could be loaded and carried in the ordinary form. While, as was pointed out, this did not increase the total amount of cotton carried, it certainly decreased the expense of carrying such total amount. Notwithstanding this fact, the majority of the Commission held that the complainant was not entitled to a lower classification. The most important argument in favor of the decision is that the method of compression was expensive and was not open to everyone, and that it was therefore improper to give an advantage to the comparatively few shippers who could use it. This argument is sound, and is probably sufficient to justify the decision; and it has its bearing on the point next under discussion.⁶⁶

⁶³ *Clements, Com., in Roth v. Texas & P. Ry.*, 9 I. C. C. Rep. 602, 605.

⁶⁴ *Oak Grove Farm Creamery v. Adams Exp. Co.*, 19 I. C. C. 454.

⁶⁵ 11 I. C. C. Rep. 382.

⁶⁶ The Commission disapproves a rule permitting the application of the balance of a through carload rate on a less-than-carload quantity mov-

§ 536. Trainloads.

While lower carload rates are based on a real saving in cost of transportation, the same thing cannot be said, at least to the same extent, of train-load rates; and such rates are not generally permissible.⁶⁷ As the Commission has had occasion to point out, giving greater consideration to train-load than to carload traffic would be to the prejudice of small shippers and the public.⁶⁸ But in England it is held that under certain circumstances lower rates may be given for shipments in trainloads.⁶⁹ And, indeed, were it not for the policy involved, it would be held very probably in America that there is a sufficient difference in traffic costs between car loads and train loads to justify rates slightly lower for the train service as against the car service.⁷⁰

§ 537. Traffic handled in special trains.

This general subject was considered at length in connection with the classification of peaches carried to market on special trains.⁷¹ The complaint was made by shippers of peaches from Delaware to New York. The traffic was moved in separate trains from other freight, and at a high rate of speed. The freight moved, according to the evidence, at about 28 to 30 miles an hour, which did not include the time at stations. Notwithstanding the speed at which the trains were moved, the time required to reach Jersey City from the Peninsula was 12 hours and upwards. Respondents estimated the cost of movement of this traffic at about double that of ordinary freight. Empty cars in this trade were returned at the same rate of speed. They carried no return loads. Cars used for general freight ordinarily carry return loads and make

ing from a transit point. *Southwestern Millers' League v. A., T. & S. F. Ry.*, 24 I. C. C. 552.

⁶⁷ *Paine v. Lehigh Valley R. R.*, 7 I. C. C. 218.

⁶⁸ *Anaconda Copper Mining Co. v. C. & E. R. R.*, 19 I. C. C. 592.

⁶⁹ *Nicholson v. Gt. Western Ry.*, 4 C. B. (N. S.) 366.

⁷⁰ *Carsteens Packing Co. v. O. S. L. Ry.*, 17 I. C. C. 324.

⁷¹ *Delaware State Grange v. New York, P. & N. R. R.*, 3 Int. Com. Rep. 554, 2 I. C. C. Rep. 309.

slow time, and the usual earnings of such a car are five dollars a day. The Commission held that the peculiar needs of this service, requiring the withdrawal of cars for a period of two months or more from other service, the special fitting up of the cars for the carriage of the freight, the high rate of speed at which the trains are run in order to make early delivery at the markets, the greater wear and deterioration to the cars, tracks and bridges by the increased rate of speed and the return of the cars empty, also at high speed, justifies a considerably higher rate than for ordinary freight. The Commission also said that a material feature in fixing the rating was the speed, which was not confined to the loaded cars, but also included the return of the empty cars, and was therefore a service in both directions.⁷²

§ 538. Car loaded by several shippers.

It has been said that a difference in rate for a solid carload of one kind of freight, from one consignor to one consignee, and a carload quantity from the same point of shipment to the same destination, consisting of like freight or freight of like character from more than one consignor to one consignee, or from one consignor to more than one consignee, is not justified by the difference in cost of handling.⁷³ And, indeed, the saving effected by carload transportation, for a single shipper to a single consignee, would equally be effected when a car is loaded by several shippers acting together, or by a forwarder collecting goods from several consignors and packing them together. Although the Commission has never had any hesitation about this matter, the courts had for a time doubts as to whether this practice was not unfair to the business of the railroads; but it has finally been decided quite recently by

⁷² See also *Gardner v. So. Ry.*, 10 I. C. C. 342.

⁷³ *Thurber v. New York C. & H. R. R. R.*, 2 Int. Com. Rep. 742, 3 I. C. C. 473.

See *Buckeye Buggy Co. v. Cleveland, C., C. & St. L. Ry.*, 9 I. C. C. Rep. 620.

the Supreme Court, that a forwarder offering a carload of goods for shipment is entitled to the same rate as any other shipper of goods in carload lots.⁷⁴

§ 539. Commission rulings upon special ratings.

Since the later decisions of the Supreme Court there can no longer be any doubt as to the powers which the Commission now possesses under the Act as amended. It may determine what shall be the difference in rate between carload and less-than-carload lots; it may decide whether the difference in revenue, due to a difference in method of loading, warrants a difference in the rate on carload shipments of the same article.⁷⁵ Indeed, the Commission since the recent amendments has had no question that it could order special rates for carload quantities to be established wherever carload quantities are so generally offered in the shipment of the commodity in question as to make such rates clearly enough in the public interest.⁷⁶ It is generally provided under tariffs that in order to obtain the benefit of a carload rate on actual weight of overflow beyond the capacity of the car, the shipment must have moved under one bill of lading.⁷⁷ Charging a higher rate on coal loaded in open cars than on coal in box or stock cars was not found unreasonable by the Commission, and a difference in rates may be made when lumber is loaded in flat cars instead of being loaded in box cars.⁷⁸ Less-than-carload rates are applicable to a different class of traffic from that embraced in carload and peddler-car shipments.⁷⁹ Under an any-quantity rate the carrier has freedom in the use of its equipment;

⁷⁴ *Interstate Commerce Commission v. D., L. & W. Ry.*, 220 U. S. 235, 31 Sup. Ct. 392.

It was formerly held otherwise by the federal courts. *Lundgrust v. Grand Trunk W. Ry.*, 121 Fed. 915.

⁷⁵ *Atchison, T. & S. F. Ry. v. U. S.*, 232 U. S. 199, 34 Sup. Ct. 291.

⁷⁶ *Western Classification Case*, 25 I. C. C. 442.

⁷⁷ *Scudder v. T. & P. Ry.*, 22 I. C. C. 60.

⁷⁸ *In re Advance on Lumber*, 24 I. C. C. 686.

⁷⁹ *Rates on Packing-House Products*, 28 I. C. C. 599.

and such a tariff gives the shipper no right to demand a car of a given size.⁸⁰

§ 540. Car sizes.

Where a car was loaded according to carrier's loading restrictions, the weight then being less than minimum, it was held that the actual weight should govern.⁸¹ But where a car was loaded to full visible capacity, and transportation charges were assessed on higher minimum weight, it was held that the charges were unreasonable to the extent assessed.⁸² When a shipment requires a car of greater capacity than can be furnished by the carrier, two or more smaller cars should be furnished, and charges assessed upon the basis of actual weight of shipment, but not less than the minimum weight prescribed in the tariff for a carload.⁸³ A tariff rule providing minimum weight of 50,000 pounds, subject to rule "except when marked capacity of car is less, in which event marked capacity of car will govern," was construed by a carrier to vary minimum, only when carrier was unable to furnish cars of prescribed capacity; but it was held by the Commission that this rule so construed was unfair, and should have provided that when shipper ordered car of certain capacity, and carrier for its own convenience furnished car of greater capacity, the capacity of car ordered should be applied, subject to actual weight, if in excess.⁸⁴

§ 541. Special equipment not necessary.

If, however, the carrier provides a special equipment not because it is required by the nature of the traffic, but for its own convenience, or to attract patronage in competition with a rival, the fact that the article is thus

⁸⁰ *Falls & Co. v. C., R. I. & P. Ry.*,
15 I. C. C. 269.

⁸¹ *Oregon Lumber Co. v. O. R. R.
& N. Co.*, 19 I. C. C. R. 582.

⁸² *Barnard v. C., M. & St. P. Ry.*,
26 I. C. C. 91.

⁸³ *Riverside Mills v. St. L. & S.
F. R. R.*, 24 I. C. C. 264.

⁸⁴ *Hull Co. v. M. P. Ry.*, 21 I. C.
C. R. 486.

carried does not justify high classification. This was held in one case relating to oranges.⁸⁵ It appeared that the transportation of oranges received special care and attention from the defendants. Cars and steamers were ventilated; trains were run on fast schedules which limited the number of cars and increased the consumption of coal, and extra accommodations and employees were provided at shipping, junction and terminal points. Moreover, most of the cars engaged in this traffic by the all rail lines returned empty, and the cars carrying oranges north were not loaded to their full capacity, the average load not exceeding nineteen thousand pounds. The service, therefore, was more expensive than that rendered in connection with ordinary freight. Nevertheless, the Commission found that oranges were not perishable, and that this special care was unnecessary to their preservation; and thereupon held that it would not justify a high classification.⁸⁶

Topic F. Difference in Rate Between Classes

§ 542. Principles governing differences between classes.

It remains to point out formally, what has been assumed throughout this chapter, that there are great differences between the rates payable for transportation for the same distances upon goods in different classes. As the Commission has pointed out, striking differences in distinct commodities ordinarily result in substantial differences in rates.⁸⁷ There is no fixed percentage for differentiation even of the six classes usually established; still less is there any definite rule for the differences to be made between commodities

⁸⁵ *Railroad Com. of Florida v. Savannah, F. & W. R. R.*, 3 Int. Com. Rep. 688, 700, 5 I. C. C. Rep. 13.

⁸⁶ See also *Gardner v. So. Ry.*, 10 I. C. C. 342.

⁸⁷ *Anthony v. P. & R. Ry.*, 14 I. C. C. 581.

In fixing rates it is to be borne in mind that the carrier and the shipper may both insist upon a rate that is just and reasonable to them respectively and relatively. *Rates on Crushed Stone*, 30 I. C. C. 22.

with extra class rating. But it is matter of common knowledge that there are great differences between rates payable by the different classes, the highest class usually paying for the same transportation many times what is paid by the lowest class. Thus commodities of distinctively high grade should be so rated as to bear their proportionate share of general transportation expense.⁸⁸ All that can be said in general is that the principles as to rate making apply here as elsewhere, and that the burden must be thrown upon the various classes without outrageous disproportion.

§ 543. Low-grade commodities may be carried at low rates.

To go to one extreme, low-grade commodities may be carried at rates relatively very low indeed. Provided that the rate is remunerative, the other classes cannot complain that the rate is disproportionately low, since unless such a rate were made the traffic would not be got and the higher classes would lose the benefit. To quote the Commission again:⁸⁹ "While some of the relatively low rates on low-class commodities, including iron and steel, are lower because of competition by water than they would otherwise be, the general comparatively low rating applied to them is largely due to the character of such commodities, the use to which they are put, the demand for them in large quantities throughout the country, their susceptibility of movement at less cost and risk to the carrier than high class and more valuable freight, and other like conditions. It is to the interest of the carriers as well as the public, that their rates be low enough, if not below a remunerative point, to permit the general movement and distribution of these commodities in general

⁸⁸ *Kiser Co. v. C. of G. Ry.*, 17 I. C. C. 430.

The Commission cannot order low rates to be put on certain traffic, on the basis that the carrier may recoup itself by the charges it is making

other shippers. *Railroad Commission of Fla. v. So. Exp. Co.*, 28 I. C. C. 634.

⁸⁹ *Colorado Fuel & Iron Co. v. So. Pacific Ry.*, 6 I. C. C. Rep. 489.

demand in large quantities for construction, building, manufacturing, and other purposes. Reasonable freedom of such movement and distribution stimulates the growth and development of the country and thereby promotes all interests. The general prevalence of such lower rates on this character of freight is due to the carriers' usual policy of making rates that will fairly permit the traffic to move, if of such value that it will bear reasonable charges. Rates on steel rails and other low-grade freights of the character stated, yielding per ton per mile the average received on all freight, would be unjust. The value of the goods, the cost of the service, the degree of risk to the carrier, among other considerations, have important bearing upon the relation of rates on different kinds of traffic as well as the reasonableness of the rate on a specific article."⁹⁰

§ 544. High-grade commodities should not be overcharged.

On the other hand, just because high-grade commodities will stand a rate relatively very much higher, it is not justifiable to charge them outrageously disproportionate rates. This was set forth in a most striking manner in one report of the Commission, where it said:⁹¹ "Fur hats, for example, move at first-class rates, and six dozen of these ready for shipment weigh, approximately, 100 pounds. The cost of transporting that 100 pounds from New York, where these hats are manufactured, to Chicago, is 75 cents, or about 1 cent per hat. Evidently the number of hats worn in the city of Chicago would not be appreciably diminished if this freight rate were to be

⁹⁰ The Commission finding that on sawdust, in carloads, a commodity rate of 20 cents was exacted, held that sawdust, being a low-grade commodity and valued at about \$1.50 per ton, the rate should not exceed 8 cents per 100 lbs., minimum 24,000 lbs., so as to correspond with the rate on fuel wood and that on saw-

dust on the lines of other carriers in the territory in question. *William Plummer Co. v. N. P. Ry.*, 18 I. C. C. 530.

⁹¹ *Re Advances in Freight Rates*, 9 I. C. C. Rep. 382.

Nitro-cellulose-wet should be classified first-class, *L. C. L. U. S. v. W. & N. R. R.*, 26 I. C. C. 309.

doubled. If such hats were manufactured both at New York and at Baltimore, and the rate from New York were to be increased, while that from Baltimore remained the same, this might shut up the New York factory; or, if the rate were too high, the establishment of a factory in Chicago might be induced; although this would not be true in case of hats, since the raw material, which moves at the same rate, originates on the Atlantic Seaboard. Probably the first-class rate throughout all Official Classification territory could be advanced 50 per cent without appreciably reducing the volume of traffic.”⁹²

§ 545. Proportionate difference between the classes.

The principle to be deduced, from the cases which have just been discussed, is that the differences in rates between the classes in a classification should not be disproportionate. It has often been remarked that a relation of rates, when once established on sound grounds, has a more permanent basis than a rate.⁹³ The classification being made, a rate must be fixed for each class; and the difference in rates between the different classes must be reasonable, in addition to the requirement that the rates in themselves should be reasonable.⁹⁴ In one recent case, where the complainant contended that the Official Classification ratings were unjust and unreasonable, in comparison with those in the Southern and Western classifications, it was held that a comparison of the ratings in the different classifications is by no means a guide to the relative transportation charges, unless the class rates under the several classifications are also considered.⁹⁵ In an earlier case it

⁹² Advance in bicycle rating from second to first class found unreasonable. *Davis Sewing Machine Co. v. P. C. C. & St. L. Ry.*, 26 I. C. C. 282.

The application of one and one-half first-class rating on bottle-washing machines shipped from Lynn, Mass., to San Francisco, Cal., found

unreasonable. *Western Traffic Ass'n v. B. & M. R. R.*, 24 I. C. C. 592.

⁹³ Rates from the Walsenburg Coal Field, 26 I. C. C. 85.

⁹⁴ *Business Men's League v. Atchison, T. & S. F. R. R.*, 9 I. C. C. 318.

⁹⁵ *Milburn Wagon Co. v. L. S. & M. S. Ry.*, 22 I. C. C. 93.

was said that while an alignment on a universal percentage basis between the classes might bring about more logical and consistent adjustment, the adjustment attacked in these proceedings, being the outgrowth of actual conditions and the result of a gradual development, was not unjustly discriminatory, nor was it shown to yield unreasonable earnings.⁹⁶ An increased rate on raw material argues for higher rate on finished product to keep the relative proportions in effect.⁹⁷ The general principle is now well established that shippers are entitled to rates both relatively and inherently reasonable.⁹⁸

§ 546. Principles in making commodity rates.

In one investigation the Commission went into the relative rates upon different commodities to determine whether they were justifiable. Comparing these they said:⁹⁹ "Dressed beef loads about 22,000 pounds to the car. Refrigeration is necessary, and this requires a car of peculiar construction and of unusual weight—about 36,000 pounds. The ice and salt weigh, approximately, 5,000 pounds, making in the aggregate for the entire load, 63,000 pounds, of which but 22,000 pounds are paying freight. At 45 cents a hundred this would amount to \$99 per car. Packing-house products, or provisions, load somewhat heavier than dressed beef, on the average about 30,000 pounds. This, upon a basis of 30 cents, would yield a revenue of \$90 per car. The average loading of grain cars upon standard lines at the present time is probably 65,000 pounds. It was said by all witnesses inquired of that grain is now loaded to the full capacity of the car. Within the last three years railroads have added

⁹⁶ Indianapolis Freight Bureau v. C., C. & St. L. Ry., 15 I. C. C. 504.

⁹⁷ Rates on Linseed Oil, 26 I. C. C. 205.

⁹⁸ Coke Producers' Ass'n v. B. & O. Ry., 27 I. C. C. 125.

⁹⁹ See Re Advances in Freight Rates, 9 I. C. C. Rep. 382.

Other conditions being equal, the rate per ton-mile from ice traffic ought not to equal the average from all sources. Mountain Ice Co. v. D., L. & W. R. R., 15 I. C. C. 305.

largely to their equipment of freight cars, and the addition has been almost entirely in cars of large capacity. The traffic manager of the Michigan Central testified that the cars upon his system are from 60,000 to 80,000 pounds capacity. A grain load of 65,000 pounds would yield \$113.75, as against \$99 for dressed meats and \$90 for provisions. The total weight of the grain and car would be greater than either the dressed beef or provisions, but testimony in previous cases showed that in the operation of these railways the tendency is to regard the loaded car as the unit; a train-load, consisting of a certain number of cars without much reference to the loading of those cars.”¹

§ 547. Reasonableness tested by comparison.

Where the same rate was given to the class containing finished cheap bedroom sets of furniture and to another class containing unfinished sets of the same sort, which were of less value and could be packed in smaller bulk, it was held that the failure to make a distinction in rates was unfair; and upon consideration the rate on the unfinished class was fixed at eighty-five per cent of that on the finished furniture.² Upon similar principles a classification which puts into different groups “steam coal,” which is coal that can be used only for manufacturing purposes, and soft or lump coal, which is of higher value and is used for domestic purposes, is proper.³ Where rates on a particular commodity bear a uniform relation to rates of a certain class, any inequalities in those rates, as between different places, are those peculiar to that class. A finding, therefore, that rates on such commodities made to conform to a class are relatively unjust would inferen-

¹ *Potter Mfg Co. v. Chicago & G. T. R. R.*, 4 Int. Com. Com. 223, 5 I. C. C. Rep. 514.

The extensive application voluntarily by other carriers than defendant of fourth-class rates on oils is evidence of the unreasonableness of

higher rates in the same general territory. *Bartles Oil Co. v. C., M. & St. P. Ry.*, 17 I. C. C. 146.

² *Potter Mfg Co. v. C. & G. T. Ry.*, 5 I. C. C. 514.

³ *McGrew v. Missouri Pac. Ry.*, 8 I. C. C. Rep. 630.

tially condemn the adjustment with respect of the entire class, and this is also true of the reasonableness of the rates.⁴ Owing to differences in bulk and weight, there must of necessity be marked variations in revenue per car produced by articles in the same and other classes, and a disparity either way is not conclusive of the propriety of an adjustment.⁵

§ 548. Slight differences between similar commodities.

In one proceeding⁶ before the Commission the complainant claimed that beans and tomatoes should go in the same class, and that the defendant railway, by putting beans in the second class at a rate of 70 cents per hundred, while tomatoes went third class at a rate of 44 cents per hundred, had discriminated against the complainant as a shipper of beans. The Commission, however, said: "An exact classification is impossible. Unless the number of classes is infinitely increased there must always be articles in respect to which it will be very difficult to determine into which of two classes they should fall. If the elements which fix the class are substantially the same in case of two articles, then those articles should, as a matter of law, be classified alike, and to put one in one class and another in another class would be a discrimination and a violation of the Act, no matter what the purpose of doing it might be. It appears here that beans and tomatoes are both shipped in peck boxes and that the defendant's agent at Verona was accustomed to receive and bill the same number of boxes for one hundred pounds whether of beans or of tomatoes, so that the complainant, as a shipper of

⁴ *Acme Cement Plaster Co. v. L. S. & M. S. Ry.*, 17 I. C. C. 30.

⁵ *Kiser Co. v. C. of G. Ry.*, 17 I. C. C. 430.

⁶ *Rea v. Mobile & O. Ry.*, 7 I. C. C. Rep. 43.

The rate on burlap bags ought to be somewhat higher than upon

the burlaps, but there is no theory upon which the carriers could justly establish this and Commission approved a rate upon burlap bags twice as great as that upon the raw product. *Kent Co. v. N. Y. C. & H. R. R. R.*, 15 I. C. C. 349.

beans, was obliged to pay 70 cents for transporting eight boxes of his commodity to East St. Louis while the shipper of tomatoes was only obliged to pay 44 cents for transporting eight boxes of his commodity, the nominal weight being the same and the value about the same. If this were all there was of the testimony we might hold that beans ought to be rated third class with tomatoes, but the defendant's testimony tends to show that beans are more perishable, and it appears, in part from the complainant's testimony as well as that of the defendant, that tomatoes are in fact heavier than beans."⁷

§ 549. Discrimination between commodities forbidden.

In determining whether there is a discrimination between differing but similar articles, all the factors which go to effect a reasonable rate are to be considered, such as character and quality of the commodity, cost of production, extent and nature of the competition in the business itself and by other transportation lines, and the interests of the public in the use of the commodity, and its market cost.⁸ The commodities must be similar in order to claim equality of treatment; live stock and their products are entitled to such treatment.⁹ But not fresh meat and fresh fruit.¹⁰ A lower export rate may sometimes be justified, but the difference must be a reasonable one; and it would not be proper to make a permanent difference.¹¹ In one important proceeding it was remarked that the relation of import rates as between New York and Boston should

⁷ See also *Harvard Co. v. Pennsylvania Co.*, 3 Int. Com. Rep. 257, 4 I. C. C. Rep. 212.

There should be a definite relation between live hogs and products thereof based upon transportation conditions. *Sinclair & Co. v. C., M. & St. P. Ry.*, 21 I. C. C. 490.

⁸ *Imperial Coal Co. v. Pittsburgh & L. E. R. R.*, 2 Int. Com. Rep.

436, 2 I. C. C. 618; *F. Schumacher Milling Co. v. Chicago, R. I. & P. R. R.*, 4 Int. Com. Rep. 373, 6 I. C. C. Rep. 61.

⁹ *Chicago L. S. Exch. v. Chicago G. W. Ry.*, 10 I. C. C. Rep. 428.

¹⁰ *Miner v. New York, N. H. & H. R. R.*, 11 I. C. C. Rep. 422.

¹¹ *Re Export and Domestic Rates on Grain*, 8 I. C. C. Rep. 214.

apply to both class and commodity rates.¹² As in the making of distance rates so in the making of commodity rates it is often urged that commercial equalization should be in the mind of the rate maker. But although such a policy may be employed to a certain extent here as elsewhere, it is also true that the rate maker may ignore it. And the principle to be deduced from all the cases which have just been discussed is plainly that the differences in rates between the classes in a classification should not be disproportionate, and of this the rate maker should never lose sight.

§ 550. Difference between values justifies different classification.

Where two similar articles are compared, a difference in classification may be justified merely because of a difference in value. Thus where a complaint was made because other cereal products were given a higher classification than flour, the Commission said: "The question presented by complainant is, whether the other cereal products exceeding flour in value, the highest 68.2 per cent, the lowest 9.1 per cent, and giving an average excess in value of 33.4 per cent, should take the same classification, and therefore the same rate, as flour, values alone being considered?"¹³ It is a conceded rule of classification that value, on account of enhanced risk and ability to pay a greater proportion of the aggregate return upon investment, may justify a higher classification, and in view of this rule the difference in values here shown is sufficiently great to justify the conclusion that the comparison as to value alone furnishes no sufficient reason for a classification with flour." And upon the same principle, when it was claimed that a different classification on milk and cream, carried in the same sized can, could not be reasonable, the Commission pointed out that the element of value in the commodity transported

¹² Chamber of Commerce of New York v. N. Y. C. & H. R. R. Co., 24 I. C. C. 674, 677.

¹³ McDill, Com., in Schumacher Milling Co. v. Chicago, R. I. & P. R. R., 6 I. C. C. Rep. 61.

forms a proper consideration to be taken into the account in the establishment of a rate, and justified the difference because of the great difference in value between milk and cream.¹⁴

§ 551. Relative differences between ratings.

The Commission has feared that to apply the same percentage relation in class rates in every part of the country would create confusion and discrimination, instead of securing uniformity and equal treatment.¹⁵ It will be obvious, however, that there are certain principles to be observed, such as that in framing any schedules of rates normally any-quantity rates should be higher than carload and lower than L. C. L. rates would be.¹⁶ A commodity rate higher than the class rate is not of itself unlawful;¹⁷ but ordinarily whatever relation is established for class rates would apply in case of commodity rates.¹⁸ Although a very considerable spread is allowed, the difference in rate between carload L. C. L. should not be too wide.¹⁹ And the less-than-carload rate should bear a reasonable and proper relation to the carload rate.²⁰ Very often the facts do not warrant fixing of carload rates solely on the basis of given percentages of L. C. L. rate.²¹ Indeed, because of the long-continued practice of the carriers to which the commerce of the country had adjusted itself, the Commission early in its history accepted as valid and justified a carload rate that was less proportionately than a rate on a less-than-carload shipment of the same commodity.²² In establishing a proper relation between the carload and

¹⁴ *Howell v. New York, L. E. & W. R. R.*, 2 Int. Com. Rep. 162, 2 I. C. C. Rep. 272.

¹⁵ *Iowa State Board of R. R. Com'rs v. A. E. R. R.*, 28 I. C. C. 563.

¹⁶ *Mutual Rice Trade & Development Ass'n v. I. & G. N. R. R.*, 23 I. C. C. 219.

¹⁷ *Wheeling Corrugating Co. v. B. & O. R. R.*, 18 I. C. C. 125.

¹⁸ *Iowa State Board of R. R. Com'rs v. A. E. R. R.*, 28 I. C. C. 193.

¹⁹ *Virginia-Carolina Chemical Co. v. St. Louis, I. M. & So.*, 18 I. C. C. 1.

²⁰ *Hood & Sons v. Del. & Hud. Co.*, 17 I. C. C. 15.

²¹ *In re Advances on Milk*, 23 I. C. C. R. 500.

²² *Carstens Packing Co. v. O. N. L. R. R.*, 17 I. C. C. 324.

less-than-carload ratings consideration should be given the demands upon the terminal properties.²³ Apparently it may be provided that no single shipment or small lot of freight of one class will be taken at less than a minimum of one hundred pounds.²⁴ Different articles require such different care in carriage that it would be unjust to fix a single rate that should apply to all articles carried.²⁵ It is necessary in order to distribute fairly among the shippers the burden of the entire schedule of rates to graduate the charge according to the nature of the article carried.²⁶

²³ *Western Classification Case*, 25 I. C. C. 442.

²⁴ *Kleibacker v. L. & N. R. R. Co.*, 22 I. C. C. 420.

²⁵ The Commission may not order in a system of rates which is unjustly apportioned. *Lehigh Valley Ry. v. United States*, 204 Fed. 986.

Nature of the commodities classified respectively considered in determining reasonableness of rates. *Meridian Fertilizer Factory v. T. & P. Ry.*, 26 I. C. C. 351.

²⁶ The Commission, subject to review by the courts only if it has acted with outrageous disregard for the conditions with which it is dealing, may order the differential to be observed between C. L. and L. C. L. *Atchison, T. & S. F. Ry. v. United States*, 204 Fed. 647.

Percentage adjustment between C. F. A. and East ought not to be disturbed. *Schmidt & Sons v. M. C. R. R.*, 23 I. C. C. 684.

CHAPTER XII

METHODS OF FIXING RATES

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- 561. Fixing the particular rate.

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§ 560. Provisions of the Act.

The Commission had originally little power over the details of rate making, but by the 1910 Amendment the bases upon which tariffs are made seem to be pretty much in its hands. The provisions of section 6, requiring the publishing of schedules, and insisting upon adherence thereto as the only proper rate to be charged, are old; but to the requirement that on request the officials must themselves decipher their schedules, and quote a correct rate under penalty for failure, is new. And section 15 now provided in detail that the Commission shall have the power to make orders, with reference to rates, tariffs, regulations, or practices which are or may be made or prescribed, and just and reasonable regulations and practices affecting rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of the Act, which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to its provisions. The extent to which in making rates the relations

of distances must be observed is more fully discussed in Chapter XVI than here.

§ 561. Fixing the particular rate.

There are certain details relating to the fixing of a rate which must be considered. Rate making has become enough of a science to have its own technique. The separate rate is the definite charge fixed by the person conducting a public employment as the price regularly demanded for performing the service asked. So many kinds of service are asked by so many people, that it would be inconvenient to conduct the business without some established schedule of rates. It would, indeed, be a practical impossibility to fix a separate rate for each service by itself. Thus a classified schedule of regular charges is the usual characteristic of a public business. Indeed by modern legislation such rate schedules are made obligatory, to make sure that all may know the rate in advance, and to make certain that all shall be charged the same rate. Various methods of charging, it will be seen, may be adopted in framing such schedules, so long as the rate imposed may be known with certainty. And this end is furthered by basing rates upon some unit of service. This is indeed the most salient characteristic of a rate, considered abstractly, that it is an entirety—the single charge for the whole service which is performed.

Topic A. The Unit of Charge

§ 562. Characteristics of a rate.

It is natural in public calling in the generality of cases that things are done by rule. The very character of the business usually dictates this policy. Public businesses are commonly carried on upon a large scale; and action according to rules fixed in advance is always found necessary for the proper conduct of any great business. This applies to charging compensation as much as it applies to any other thing done in carrying on the business. It is therefore

plainly consistent with public duty for those who manage a public service to establish a schedule of rates as the basis of charges.²⁷ A rate thus fixed is a regulation, and has the legal characteristics pertaining to a regulation made by a public service company to govern the dealings between itself and the public. Thus a schedule of rates once duly established will be presumed to be reasonable unless the contrary is shown. It will be recognized that some minor inequalities are unavoidable in the application of all schedules. It will be considered proper to publish these rates so that a person dealing with the public company may know with some certainty how much he will be charged.²⁸ And it will be held bad practice to change established rates without giving notice. All these are generally true of other regulations, and it is submitted that they ought to be held as to rates.

§ 563. Established unit prima facie reasonable.

Where the carriers establish a classification and continue it in operation for a considerable time, it may fairly be inferred that the classification is a reasonable one, and it will be so presumed; and the burden of showing the charge unreasonable is on the party, whether carrier or shipper, who proposes a change. "The continuance of a given rate is not conclusive evidence of the reasonableness of that rate; but when a railway company advances a rate which has been for some time in force, the fact of its continuance is *in the nature of an admission* against that company which tends to show the unreasonableness of the advance."²⁹ Where, however, a classification is adopted and maintained under an order of the Commission no such presumption can be made, even though the Commission has no power to enforce its order, since the carrier does in fact obey the

²⁷ See *Alan Wood I. & S. Co. v. Pa. R. R.*, 24 I. C. C. 27.

²⁸ *Re Charges on Food Products*, 4 I. C. C. 48.

²⁹ See *Western Classification Case*, 25 I. C. C. 442.

order, and does not act voluntarily and upon its own judgment. "The carriers classified soap in carloads as fifth-class freight originally, and only changed it to sixth class in compliance with our order in 1891. However limited the compulsory effect of an order by the Commission may be in the present state of the law, compliance with its requirements cannot be regarded as voluntary action by the carriers. There is nothing to show that the carriers would have changed soap in carloads to sixth class in 1891 or later if no order requiring that to be done had been issued." ³⁰

§ 564. Classification sheet not varied by representation.

The classification sheet, as has been seen, becomes binding from the moment of publication; and it cannot be varied by any private bargain or by any representation made to a particular shipper.³¹ "It will be convenient, before taking up the official classifications for examination, to consider the complainant's claim that he was induced to locate at Ashtabula by the assurances of defendant's agents that his goods would be taken as sixth class. Some importance is attached to these assurances as establishing equities in his favor. On the other hand, it is contended by the defense that complainant was understood in the correspondence to be asking for rates upon blocks as they are when first cut from the log and with the bark on, and that it was with reference to such blocks that rates were given him. We do not however consider this very material. The official classification must have the same construction in favor of all other persons as is given in favor of complainant; no assurances to him, however honestly made or honestly relied upon, can entitle him to special rates. He could not have special rates under an express promise, and quite as plainly he cannot have them because of any conduct of defendant's agents such as was shown in proof. The law

³⁰ *Holmes v. Southern Ry.*, 8 I. C. C. Rep. 561. *v. Lake Shore & M. S. R. R.*, 2 Int. Com. Rep. 81, 2 I. C. C. Rep.

³¹ *Cooley, Chairman*, in *Hurlbut* 122.

requires uniformity and impartiality in the dealings of a carrier with all its customers." ³²

§ 565. Methods of charging in rate making.

It is for the management of the railroad to decide the basis upon which the rate shall be made up. More than this, it will commonly be not unreasonable to employ different methods in arriving at the proper rate in different cases; and if these differing methods are respectively used in appropriate treatment of varying subject-matter, it is plain that this is not only consistent with public duty, but cases can even be imagined where not to do so would be inconsistent with public duty. It is, for example, plainly justifiable for a railroad in making its freight rates to charge for coal by the ton, but for paper boxes by the cubic yard. "The space required is rightly taken into account in the adjustment of freight charges, when the bulk is so considerable in comparison with weight as to occupy space which if taken up by heavier freight would yield larger receipts." ³³ What has just been said is of course subject to the limitation that there must be no illegal discrimination of any sort by charging some by one measure and others by another. But where the railway company fixed rates for packages containing a certain number of pounds, it was held that baskets of fish, of a size required by the business, should be rated by the pound and not by the size of packages as contained in the published rates of the railway company. ³⁴

³² See *Proctor & Gamble Co. v. C., H. & D. Ry.*, 9 I. C. C. 440.

³³ Commissioner Morrison in *James v. East Tenn. V. & G. R. R.*, 2 Int. Com. Rep. 609, 3 I. C. C. Rep. 225.

The Commission has recognized the right of carriers, in order to facilitate the movement of business, to fix an estimate weight upon certain standard packages upon which a rate is based. This estimated

weight is taken into consideration in the making of the rate itself, and of such estimated weights shippers have the right to complain before this Commission and secure relief. *White & Co. v. B. & O. S. W. R. R.*, 12 I. C. C. 306.

³⁴ *Woodger v. Great Western R. Co.*, 2 Nev. & Mac. 102, s. c., L. R. 2 C. P. 318.

Certain conditions govern classi-

§ 566. A minimum rate is justifiable.

A minimum rate is an excellent illustration of another characteristic of the rate considered as a regulation establishing a unit. Such a rate may be supported, although it operates in some cases somewhat differently than it does in others; for this is the normal operation of a regulation. It may therefore be true that some applicants are paying for a little more than others upon a pro rata basis, and the objection of discrimination cannot be taken. This matter of the minimum charge was thoroughly canvassed in one of the earlier cases before the Commission,³⁵ where plaintiff, a shipper of chewing gum, objected to the defendants' rule providing that the minimum charge upon any single shipment of freight should be for one hundred pounds at the rate applying to the article. The Commission said squarely: "It is reasonable and proper that carriers should fix a minimum weight and charge for the transportation of less than carload shipments. This is justified by the necessary expense and trouble attending the carriage of such shipments, large or small, which, aside from the actual manual labor involved, are practically the same irrespective of the weight or bulk of the package. Therefore, the only question presented for determination is whether or not the rule in force is reasonable, and not unjustly discriminative in its application. The amount of clerical work required in the shipment, transfer to connecting carriers and delivery of a shipment, the records of the same necessary to be kept, the division of the freight charges among the carriers participating in the transportation of this traffic, is shown to be

fication of freight including weight per cubic foot, value per cubic foot, risk of breakage and volume of traffic. *Yawman & Erbe Mfg. Co. v. A., T. & S. F. Ry.*, 15 I. C. C. 260.

³⁵ *Wrigley v. Cleveland, C., C. & St. L. Ry. et. al.*, 10 I. C. C. Rep. 412.

Rule that the minimum charge for a single shipment of less-than-carload freight will be 100 pounds of the class or commodity to which the article belongs has several times been approved. *Western Classification Case*, 25 I. C. C. 442.

considerable, and justifies a higher charge proportionally than for large shipments. Such higher charge is also justified by the limited car capacity of package freight as compared with carloads of other freight. Illustrative of the minimum revenue per carload, one witness testified to an instance of the carriage of a car of package freight aggregating 1520 pounds, for which the revenue on the 50 pounds minimum basis was only \$4.36." ³⁶

§ 567. Basis of minimum weights refund.

There may be cases, plainly enough, where the protection of the carrier may require that the shipper shall pay in the first instance upon a fixed minimum weight. In one complaint before the Interstate Commerce Commission ³⁷ it was shown that the defendant railway had established minimum weights on cotton of 535 pounds per bale on shipments without certified weight, and that the defendant insisted upon payment of the freight charges specified in its expense bills when represented to the consignee, leaving the amount of any excess collected to be afterwards determined and refunded upon the filing by the consignee of the claim for overcharge. On that point the Commission said: "We do not think that a plan of billing cotton at a proper estimated weight per bale should be deemed unlawful when actual weights cannot be ascertained without great inconvenience to the shipper or carrier, and when charges are promptly adjusted by the carrier upon the basis of actual weights furnished by the consignee." ³⁸

³⁶ See *Kibler v. Southern Ry.*, 64 S. C. 242, 40 S. E. 556.

For the transportation of locomotives and tenders, charges should be assessed on a basis of a minimum total haul of 75 miles. In *re Advance in Rates on Locomotives and Tenders*, 21 I. C. C. 252.

³⁷ *Phelps & Co. v. Texas & P. Ry.*, 6 I. C. C. Rep. 36.

An estimated weight should bear

some close relation to the actual weight. Where the estimate is about one-third more than the actual weight, it is manifest that there is something radically wrong with the estimated weight. *Crutchfield & W. v. F. E. C. Ry.*, 28 I. C. C. 274.

³⁸ See *Suffern, Hunt & Co. v. Indiana, D. & W. Ry.*, 7 I. C. C. Rep. 255.

Inaccuracies in weighing result

§ 568. Charge for excess over minimum.

It would seem obvious that where a minimum is fixed it is not also a maximum; for it seems plain the company may make a minimum charge and at the same time require payment for any excess. *Prima facie* the system of charging by weight is more just than any other. It is the only system whereby the charge is made proportionate to the service rendered. Still the point was raised in one proceeding before the Commission,³⁹ the facts being that a practice had existed on the part of certain carriers of live cattle to make a carload rate irrespective of weight, leaving the shipper to load into the car as many cattle as he pleased and was able to put into it. The carriers substituted for this practice the rule that while naming a carlot rate they prescribed a minimum weight for a carload and then charged by the hundred pounds in proportion to the carlot rate for any excess over the minimum. This change was objected to by certain shippers, but the Commission held that the new rule was more just and reasonable than the practice it supplanted. The course of its reasoning may be seen in the following extracts: "We are pointed to no such reasons in this case. The charge by the 100 pounds is not only *prima facie* most just, but it is in accord with the general practice of the carriers in making rate sheets for other commodities. The general rule is to charge by weight where weight can be a proper measure, and when a carlot rate is prescribed, to fix a minimum for the load to be taken as the carlot and to charge by the 100 pounds for any excess, just as is now done in respect to cattle by this carrier. The cases must be very few in which it would be deemed

in the imposition of unreasonable charges and in discrimination between shippers just as really as do differences in the freight rate itself. In re Weighing of Freight by Carriers, 28 I. C. C. 7.

2 Int. Com. Rep. 599, 3 I. C. C. Rep. 241.

Increase in minimum weight held not to be an advance in the rate. In re Transportation of Wool, Hides, and Pelts, 23 I. C. C. R. 151.

³⁹ Leonard v. Chicago & A. R. R.,

reasonable or admissible to allow the shipper of general merchandise to load up a car at discretion, without the quantity being taken into account in determining the carrier's charges." ⁴⁰

§ 569. All factors enter into a particular rate.

A particular rate thus is a resultant of many factors. While there are certain economic forces which must be recognized as playing a legitimate part in the establishment of a particular rate, it is the office of the law to interfere to prevent the working out of these forces in an oppressive way. For experience has shown that the regulation of rates cannot be safely left to natural processes, but the law must often be called upon to prevent the distribution of the burden of rates in a disproportionate manner. But in a conservative handling of the rate problem, these economic conditions are taken into account and allowed some scope. Thus in one proceeding in passing upon rates upon corn, the Commission said ⁴¹ that while rates on a particular commodity should not be so low as to put a burden on other traffic it felt that there was no better rule applicable to the matter under investigation than that applied by railroads themselves, in accordance with which rates are so adjusted as to secure the largest interchange of commodities. This rule is approved by its frequent application in the movement of western grain through the voluntary action of the roads, on putting in force such a rate as to warrant its movement if such a rate is fairly remunerative. As the Commission has pointed out, classification is not an exact science, nor may the rating accorded a particular article be determined alone by the yardstick, the scales and the

⁴⁰ Per Cooley, Commissioner, in *Leonard v. Chicago & A. R. R.*, *supra*.

The application of higher aggregate charges upon a shipment of 3,200 pounds than upon a shipment

of 4,000, held, in this case, to be unreasonable. *Wright & Co. v. V. R. R.*, 25 I. C. C. 214.

⁴¹ *Re Rates upon Food Products*, 3 Int. Com. Rep. 93.

dollar. The volume and desirability of the traffic, the hazard of carriage, and the possibility or probability of misrepresentation of the article are considerations of prime importance in classification. At best it is but a grouping, and when the approximation resulting from it is not found to cause the exaction of an unreasonable or a discriminatory charge it will not be disturbed.⁴²

Topic B. Additional Charges for Special Service

§ 570. General principles as to additional charges.

The entire service of the carrier in connection with a single shipment being conceived of as a unit, it should follow that only one charge may be made, covering the entire unit of service. Ordinarily this is true.⁴³ The railroad company cannot make a variety of different charges for the facilities it uses and the servants it employs; for instance, it would be absurd for it to make a block signal charge or an engineer charge. It would seem to be the duty of the railroad to equip itself fully for the service it undertakes, and then to make a single rate to the shipper who wishes the transportation of certain goods to a certain place. This ought to hold true of all usual services which the carrier must render the shipper in the line of its duty; but as to services outside its obligation to the shipper it may render a separate bill if it pleases. More than this, there are, it must be admitted, certain extraordinary services in special kinds of shipments which are not required by shippers generally, and for which, it seems, it is more convenient, if indeed not more just, to make a separate charge.⁴⁴

⁴² *Forest City Freight Bureau v. A. A. R. R.*, 18 I. C. C. 205.

⁴³ In *Interstate Commerce Comm. v. Stickney*, 215 U. S. 98, 54 L. ed. 501, 30 Sup. Ct. 66, it was held a carrier may charge and receive compensation for service that it may render, or procure to be rendered,

off its own line, or outside of the mere transportation.

⁴⁴ It was held in the *319½ Tons of Coal*, 14 Blatch. 453, that a railroad could not justify charging a shipper for shoveling at a coal tipple more than the current rate for such service.

§ 571. Propriety of making extra charges.

While in the United States ordinarily the single rate includes all charges, upon the European continent freight rates do not appear to be made in this way. There is, first of all, a terminal charge, which applies to all traffic, to which a charge for movement is added.⁴⁵ In England at the present time a shipper may require the railroad company to segregate the rate, determining what part of it is fairly a terminal charge, and if he does not take advantage of the terminal facilities, he may demand under some circumstances a reduction in the rate to that amount; but, with us, the rate ordinarily includes the cost of delivery. It would seem to follow that extra charges should not generally be made by the carrier for the use of its facilities in delivering his property to the consignee; but this is not altogether agreed.⁴⁶

§ 572. Freight should cover the entire transportation.

By the general principle governing this matter also, the freight rate should cover the entire carriage, taking the goods up, transporting them to their destination and setting them down. The general considerations which seem to dictate this fundamental rule are well set forth in the following quotation:⁴⁷ "The freight demanded covers the entire service of the carrier from depot to depot. It is in law the compensation, not only for the actual carriage, but also for the facilities furnished for loading and unloading. The service is a single one, and the compensation is likewise single. The law will not permit the charge for such single service to be divided. A carrier cannot make up its bill of charges in items,—one for loading, one for carriage, one for personal service of attendants, one for delivery, etc. The freight is not an aggregate of separate

⁴⁵ See *North Staffordshire Ry. Co. v. Salt Union, Ltd.*, 10 R. & C. T. Cas. 161. *Counties R. Co.*, 2 C. B. (N. S.) 509.

⁴⁷ *Grosscup, J.*, in *Union Trust Co. v. Atchison, T. & S. F. R. R.*, 64 Fed. 992.

⁴⁶ See also *Beadell v. Eastern*

charges, but a single charge. This policy of the law is not because a particular shipper might not deal with the carrier as intelligently in the case of one method as in the other, but because the public is not so likely to deal intelligently with a series of items as with a single freight rate. The shipper may be intelligent or unintelligent, ignorant or educated, accustomed to business, or inexperienced in such affairs, deliberate and careful, or hasty and uninquiring. The service of the carrier is for one as well as the other. A single charge presents to him at once the whole problem. A series of charges might confuse him, and leave uncertain what, in the end, the aggregate would be." ⁴⁸

§ 573. No separate charge for a part of the transit.

In a recent proceeding Commissioner Lane ⁴⁹ had occasion in his opinion to discuss the extent to which the obligation of transportation under the through rate goes under American practice. The American railroad rate, he said in substance, has always been recognized as covering the full service which the carrier gives in furnishing the car, a proper place at which to load it, the conveyance of that loaded car, and its terminal delivery. The charge for these various services is not in America broken up into its component parts, and a charge imposed for each, as in England. The rate, which it requires shall be published, is a complete rate which includes not only the charge for haul, but the charge for the use of the terminals at both ends of the line. As matters now stand, determination of these questions is left very much to the instructions of the Commission. As Mr. Justice Lamar said comprehensively in a recent case ⁵⁰ where the charges to be made for fruit

⁴⁸ See *Southern Pacific Co. v. Patterson*, 7 Tex. Civ. App. 451, 27 S. W. 194, holding that an intermediate bridge charge could not be added to a through rate making it in excess of rate fixed by law.

⁴⁹ *Associated Jobbers of Los Angeles v. A., T. & S. F. Ry.*, 18 I. C. C. 310; affirmed as *Interstate Commerce Commission v. A., T. & S. F. Ry.*, 234 U. S. 294, 34 Sup. Ct. 814.

⁵⁰ *Atchison, T. & S. F. Ry. Co. v.*

moving under refrigeration were in question, what is a proper rate on fruit in precooling shipments, or a fair charge for hauling necessary ice or rendering other transportation services, are all rate making matters committed to the Commission. It may prescribe the form in which schedules shall be prepared and arranged; and may approve tariffs stating that the single rate includes both the line haul and accessorial services absorbed in the rate. Conversely, it may prescribe a tariff fixing a through rate which includes not only the haul of the fruit, but the haul of the ice necessary to keep the fruit in condition. All these are matters committed to the decision of the administrative body, which, in each instance, is required to fix reasonable rates and establish reasonable practices.

§ 574. Charges for services during transportation.

It has been seen that in general the protection which the railroad gives to goods in transit is an integral part of an indivisible service, and it should therefore be all included in the single rate made for the carriage. But there are some extraordinary services required in the case of particular shipments which may so vary in each case that it will be plainly justifiable, if not requisite, to make separate charges for them.⁵¹ An illustration of this possibility seems to be the charge commonly made separately for icing at the initial point and re-icing during transit of a refrigerator car containing a shipment of perishable freight. For this is a service specially required for this class of commodities, varying for different things which require different degrees of refrigeration, definitely ascertainable so that it can be charged against the particular shipment and

United States, 232 U. S. 199, 34 Sup. Ct. 291, affirming *Arlington Heights Fruit Exch. v. A., T. & S. F. Ry.*, 23 I. C. C. 267.

⁵¹ See some of the original rulings on such services as *Terminal charges*.—*Truck Farmers' Assoc. v.*

Northeastern Ry., 6 I. C. C. Rep. 295; *Cattle Raisers' Assoc. v. Fort Worth & D. C. Ry.*, 7 I. C. C. Rep. 295; *Re Transportation of Fruit*, 10 I. C. C. Rep. 360, 10 I. C. C. Rep. 83. *Elevator Charges*.—*In re Allowances to Elevators*, 10 I. C. C. Rep.

altogether separate therefore.⁵² At one time the status of this charge was not clearly determined, although it has always seemed plain that it is so necessary a part of modern transportation that a railroad ought to see to it that refrigeration is provided at a reasonable price. At all events, in recent years there has been no doubt, with the increase of the power of the Commission over services intimately connected with transportation, of its jurisdiction over such an auxiliary service as refrigeration.⁵³ The conditions under which a railroad may be compelled to furnish facilities for transportation under refrigeration are now well established as, for example, icing in transit; and it seems clear that unless the railroad has established a system of its own for such a preliminary service as precooling the shippers should have allowed to them the advantage resulting from such a service.⁵⁴ It should be added, as to all such charges, that where a carrier has a right to include in the rate items for special charges, whether for services furnished by the carrier himself or by another under an arrangement with the carrier, the compensation for such incidental services must be reasonable.

§ 575. Services after carriage is ended.

Common carriers by railroad in the United States have never followed a general custom of permitting their freight depots to be used for storage or general warehouse purposes, or of allowing their cars to be retained in the possession of shippers or consignees beyond a reasonable time for

309. *Demurrage charges*.—Pennsylvania Millers' State Assoc. v. Philadelphia & R. R. R., 8 I. C. C. Rep.

531. *Storage charges*.—Blackman v. Southern Ry., 10 I. C. C. Rep. 352.

⁵² *Re Transportation of Fruit*, 10 I. C. C. Rep. 360. *Accord* Truck F. Asso. v. Northeastern Ry., 6 I. C. C. Rep. 295.

⁵³ See, also, *Georgia Peach Growers' Ass'n v. Atlantic Coast Line*, 10 I. C. C. Rep. 255; *Consolidated F. Co. v. So. Pac. Ry.*, 10 I. C. C. Rep. 590.

⁵⁴ Note the course of the *California Refrigeration Cases*, 19 I. C. C. 148, s. c., 20 I. C. C. 106, s. c., 23 I. C. C. 287, s. c., 204 Fed. 647, s. c., 232 U. S. 199, 34 Sup. Ct. 291.

loading or unloading freight.⁵⁵ It has been the common understanding, based upon specific rules and regulations issued by the carriers from time to time, that freight depots, cars, and sidings of carriers can only be kept in condition for the necessary reception and handling of goods in the daily course of transportation business by prompt forwarding of freights and quickly completing delivery of transported goods to the consignees. Among the rules or regulations commonly in force upon railways and intended to effectuate the prompt shipment, carriage and delivery of freights, are the following: (a) The loading of cars furnished for shipments within a day or other short specified time, under penalty of a demurrage charge for detaining the cars, which is a substantial sum for each additional day or fraction thereof; and a similar regulation is applied to the unloading of cars by consignees on team tracks or private sidings. (b) The removal of goods from freight houses within a specified time, usually 24 or 48 hours, after notice of arrival to consignee, under penalty of storage at the freight house or at public warehouse and collection of additional charges therefor.⁵⁶ In various ways these generally described regulations are specifically stated in published freight classifications, car service rules, rate schedules, special circulars, so-called billing instructions, or bills of lading forms. They amount to conditions imposed by the carriers upon the shipment,

⁵⁵ The Commission has said that a federal authority over demurrage and track storage charges in connection with interstate commerce cannot be challenged, and is exclusive. *Wilson Produce Co. v. Penn. R. R.*, 14 I. C. C. 170.

In the absence of discrimination, Commission is as yet hesitating to order that a trunk line shall absorb the switching charge of a terminal line. *Mf'rs Ry. v. St. L., I. M. & So. Ry.*, 28 I. C. C. 93.

⁵⁶ History of the uniform demurrage code now generally in force. See *Allan Wood S. & I. Co. v. Pa. Ry.*, 24 I. C. C. 27.

The placing of a car containing an order, notify shipment on a team track and the giving of notice to the consignee amounts for the time being to a discharge of the carrier's obligation in the matter of delivery. *Roden B. Grocery Co. v. A. G. S. R. R.*, 21 I. C. C. 469.

transportation, and delivery of freight, which are not to be disregarded by shippers or consignees without incurring liability to additional expense.

§ 576. Storage charges.

After transportation is at an end and the goods ready for delivery to the consignee the obligation of the common carrier ceases to a certain extent, and if the goods are left upon its hands for a time by the owners it would seem plain that having performed the services for which freight was paid it, it can make additional charges for storage of the goods with it. More than this, since to provide such storage is no part of the carrier's duty as such, it is not confined as it is in services during carriage to charge no more than the usual price for warehousing. This was pointed out to a complainant by the Interstate Commerce Commission in the quotation which follows:⁵⁷ "We cannot agree with the contention of the complainant in this case that the defendants had no right to charge for the storage of the freight in question more than the usual public warehouse charge in force at Macon, Georgia, and Columbia, South Carolina. A railroad freight depot and a public storage warehouse are buildings whose business and uses are wholly dissimilar. The former is planned and built to accommodate the current business of the railroad when expeditiously handled, and affords no facilities for storage during long periods of time. The storage warehouse is especially designed for storage purposes. The railway company imposes storage charges, not for gain especially, but in order that it may be enabled to clear its depots to the end that current business may not be blockaded."⁵⁸

⁵⁷ *Blackman v. Southern Ry.*, 10 I. C. C. Rep. 350.

⁵⁸ The Commission now has power to pass upon such incidental charges and to require that whatever allowances are made shall be just and reasonable. *Suffern Grain Co. v.*

I. C. R. R., 22 I. C. C. 178; *Federal Sugar Refining Co. v. B. & O. R. R.*, 20 I. C. C. 200; *Anderson, Clayton & Co. v. C., R. I. & P. Ry.*, 18 I. C. C. 340; *Brook-Rauch Mill & Elevator Co. v. M. P. Ry.*, 17 I. C. C. 158.

§ 577. Demurrage costs.

Again, since the use of the cars at the end of the route is no part of the carrier's public undertaking, a charge for demurrage of cars is a charge distinct from the charge for carriage, and it may therefore be made as a separate charge. Indeed, so entirely distinct is it from the charge for carriage that by the weight of authority no lien exists to enforce it,⁵⁰ unless of course there is an express contract permitting such a lien. The extent of the limitations under which railroads by public announcements may make charges for demurrage of cars is well discussed by the Court of Appeals of Kentucky in the extract which follows: "Whether a charge of one dollar per day or fraction thereof, made for detention of cars and use of track on cars not unloaded within 48 hours after arrival, not including Sundays and legal holidays, and on empty cars not loaded within 48 hours after being placed, is a reasonable charge, and the time fixed for the loading and unloading, as required in the rule, is a reasonable time, are questions of fact, and on these issues the preponderance of the proof is clearly with the carriers. The rule must allow time enough to meet all cases likely to arise, and that such is the case here is abundantly shown by the testimony. That the rate of one dollar per day is also reasonable is conclusively shown. It may be somewhat more than the usual per cent on the first cost of a car, but this is not the

⁵⁰ *Chicago & N. W. Ry. v. Jenkins*, 103 Ill. 588; *Cleveland, C., C. & S. L. Ry. v. Holden*, 73 Ill. App. 582; *Burlington & M. R. R. v. Chicago Lumber Co.*, 15 Neb. 390, 19 N. W. 451; *Crommelin v. New York & H. R. R.*, 10 Bosw. (N. Y.) 77; *East Tennessee V. & G. R. R. v. Hunt*, 15 Lea (Tenn.), 261. *Contra*, *Kansas Pac. Ry. v. McCann*, 2 Wyo. 3; *Kentucky Wagon Manufacturing Co. v. Ohio & M. Ry.*, 32 S. W. 595, 17 Ky. Law Rep. 726. See also

Brown v. Grand Trunk Ry., 54 N. H. 535.

Where a carrier provides in its tariff for reconsignment, without any requirement for repayment of freight or guaranty of the same, it may not lawfully charge demurrage for time during which it holds the shipment while parleying with its connections as to advancement of its freight charges. *Beekman Lumber Co. v. St. L. S. W. Ry.*, 14 I. C. C. 532.

proper criterion. A railroad company does not construct cars for the purpose of storing property in them, and their use for transportation involves the use of costly railway tracks, and other expenditures. It may be true, as contended, that the shipper was not consulted in framing these rules. We think, however, if the rules are reasonable, this fact does not vitiate them."

§ 578. Terminal facilities usually included.

The usual thing, therefore, is to assume that all use of terminal facilities in delivery of the property transported is included in the rate made for the carriage. This was squarely said by the Supreme Court of the United States in a case⁶⁰ where a railroad had entered into an arrangement by which consignees of cattle could not get them except at an established stockyard, the proprietors of which charged yardage for the service. Mr. Justice Harlan in delivering the opinion of the court used the following language: "The carrier must at all times be in proper condition both to receive from the shipper and to deliver to the consignee, according to the nature of the property to be transported, as well as to the necessities of the respective localities in which it is received and delivered. A carrier of live stock has no more right to make a special charge for merely receiving or merely delivering such stock, in and through stockyards provided by itself, in order that it may properly receive and load, or unload and deliver, such stock, than a carrier of passengers may make a special charge for the use of its passenger depot by passengers when proceeding to or coming from its trains, or than a carrier may charge the shipper for the use of its general freight depot in merely delivering his goods for shipment, or the consignee of such goods for its use in merely receiving them there within a reasonable time after they are unloaded from the cars. If the carrier may not make such special charges in respect to stockyards which

⁶⁰ Covington Stockyards Co. v. Keith, 139 U. S. 128, 11 Sup. Ct. 461.

itself owns, maintains, or controls, it cannot invest another corporation or company with authority to impose burdens of that kind upon shippers and consignees. The transportation of live stock begins with their delivery to the carrier to be loaded upon its cars, and ends only after the stock is unloaded and delivered, or offered to be delivered, to the consignee, if to be found, at such place as admits of their being safely taken into possession."⁶¹

§ 579. Terminals regarded as connections.

But despite these general principles, a scheme has been worked out which has received the sanction of the Supreme Court of the United States whereby the railroad may treat stockyards which have their own railways as connecting carriers and add their rates for their services to the railroad's rate for its service. In deciding the validity of this, Mr. Justice White for the court said:⁶² "As the right of the defendant carriers to divide their rates and thus to make a distinct charge from the point of shipment to Chicago and a separate terminal charge for delivery to the stockyards, a point beyond the lines of the respective carriers, was conceded by the Commission and was upheld by the Circuit Court of Appeals, no contention on this subject arises. If, despite this concurrence of opinion, controversy was presented on the subject, we see no reason to doubt, under the facts of this case, the correctness of the rule as to the right to divide the rate, admitted by the Commission and announced by the court below. This is especially the case in view of the sixth section of the act to regulate commerce, wherein it is provided that the schedules of rates to be filed by carriers shall 'state sepa-

⁶¹ See *accord* *Union Trust Co. v. Atchison, T. & S. F. R. R.*, 64 Fed. 992; and *Butchers' & D. S. Y. Co. v. Louisville & N. R. R.*, 67 Fed. 35. But see *Walker v. Keenan*, 73 Fed. 758, 19 C. C. A. 668; and *Central S. Y. Co. v. Louisville & N. R. R.*, 192 U. S. 568, 48 L. ed. 565, 24 Sup. Ct. 339.

⁶² *Interstate Com. Comm. v. Chicago, B. & Q. R. R.*, 186 U. S. 320, 46 L. ed. 1182, 22 Sup. Ct. 824, affirming 103 Fed. 249, 43 C. C. A. 209, and 98 Fed. 173.

ately the terminal charges and any rules or regulations which could in anywise change, affect or determine any part of the aggregate of the aforesaid rates and fares and charges.' Whether the rule which we approve as applied to the facts in this case would be applicable to terminal services by a carrier on his own line which he was obliged to perform as a necessary incident of his contract to carry, and the performance of which was demanded of him by the shipper, is a question which does not arise on this record, and as to which we are, therefore, called upon to express no opinion." ⁶³

Topic C. Bases of Distance Rates

§ 580. Mileage rate tends to decrease inversely.

It is a familiar rule in the transportation of freight by railroads and has become axiomatic that while the aggregate charge is continually increasing the further the freight is carried, yet the rate per ton per mile is constantly growing less all the time. In consequence of the existence of this rule the increase of the aggregate charge continues to be less in proportion every hundred miles after the first, arising out of the character and nature of the service performed and the cost of service; and thus it is that staple commodities and merchandise are enabled to bear the charges of transportation from and to the most distant portions of the country.⁶⁴ The reason for this rule is that the cost of railway transportation is made up of the expense of the two terminals and the intermediate haul, and the terminal expenses are the same whether the haul be long or short. A few miles, or even a considerable number of miles, of additional haul may in some instances of long dis-

⁶³ The issues in this case had been repeatedly before the Interstate Commerce Commission. See, especially, *Cattle R. A. of Texas v. Chicago, B. & Q. R. R.*, 10 I. C. C. Rep. 83; *Same v. Same*, 11 I. C. C. Rep. 277.

⁶⁴ *New Orleans Cotton Exch. v.*

Cincinnati, N. O. & T. P. R. R., 2 Int. Com. Rep. 289, 2 I. C. C. Rep. 375; *Farrar v. East Tenn. V. & G. R. R.*, 1 Int. Com. Rep. 76, 1 I. C. C. 480; *Board of Trade of Troy v. Alabama Midland Ry.*, 6 I. C. C. Rep. 1.

tance transportation be practically of very little importance, and the aggregate rate therefore may be very little affected by the additional mileage.⁶⁵ As a result of this rule of diminishing mileage, local rates on one road cannot reasonably be compared with through rates on other roads in the same region.⁶⁶ Generally speaking, the Commission regards it as too well settled to need discussion that as distance increases the rate per ton-mile decreases, and merely because a greater distance point has a lower rate per ton per mile than a shorter distance point discrimination does not necessarily result.⁶⁷ But while it is a fundamental maxim that rate per ton-mile shall decrease as distance increases, to disregard rule is not of necessity a discrimination in the view of the Commission.⁶⁸ And it is a rule of well-nigh universal application that, as distance increases, the difference in distance becomes relatively less important.⁶⁹

§ 581. General standard of comparison the ton-mile.

If all conditions were equal, the rate of carriage would naturally vary according to the distance carried, and would be measured by a charge of so much per ton for each mile; or, as it is generally expressed, by a ton-mile rate. This is obviously a fair method of determining a rate where the conditions are identical; and as a theoretical doctrine it is well accepted that in the absence of other influences distance is a controlling element in determining a rate.⁷⁰ As a practical matter, however, other influences are never

⁶⁵ *McMorran v. Grand Trunk Ry.*, 2 Int. Com. Rep. 604, 607, 3 I. C. C. Rep. 252; *Hilton Lumber Co. v. Wilmington & M. R. R.*, 9 I. C. C. Rep. 17.

⁶⁶ *Imperial Coal Co. v. Pittsburgh & L. E. R. R.*, 2 Int. Com. Rep. 436, 2 I. C. C. Rep. 618.

⁶⁷ *Elk C. & L. Co. v. B. & O. R. R.*, 22 I. C. C. 84.

⁶⁸ *Boston Chamber of C. v. A., T. & S. F. Ry.*, 28 I. C. C. 230.

⁶⁹ *Black Mountain Coal Land Co. v. S. Ry.*, 15 I. C. C. 286.

⁷⁰ *Eau Claire Board of Trade v. Chicago, M. & S. P. R. R.*, 4 Int. Com. Rep. 65, 5 I. C. C. Rep. 265; *Hill v. Nashville, C. & S. L. R. R.*, 6 I. C. C. Rep. 343; *Freight Bureau v. Cincinnati, N. O. & T. P. Ry.*, 7 I. C. C. Rep. 180.

absent; some factor exists in every case to modify the comparison and to prevent the application of the ton-mile rate. The establishment of a ton-mile rate as a standard does indeed bring rates down to the narrowest point of scrutiny, and for that purpose is valuable; but it excludes consideration of other circumstances and conditions which enter into the making of rates, no matter how compulsory or imperious they may be, and it cannot, therefore, be accepted as controlling in determining the reasonableness of rates.⁷¹ It is, therefore, fundamental with the Commission that relative unreasonableness is not proven merely by comparisons of distances.⁷² But why rates over for the most part an identical route, and for almost exactly the same distance, should differ materially requires some explanation.⁷³ Distance is an element in rate adjustments, and, all other things being equal, it perhaps is a controlling element; but it can hardly control where other substantial considerations are materially different, as in grain movements.⁷⁴ Thus the average haul of lemons from California produces one of the most important transportation considerations entering into reasonableness of rate when compared with average haul of oranges.⁷⁵

§ 582. Equal mileage rates impractical.

The effects of an absolutely equal mileage rate, which must prevent its adoption as a practical system of charges, were thus stated by a committee of the British Parliament:⁷⁶ "(a) It would prevent railway companies from

⁷¹ *Gustin v. Atchison, T. & S. F. R. R.*, 8 I. C. C. Rep. 277; *Board of Railroad Com'rs v. Atchison, T. & S. F. R. R.*, 8 I. C. C. Rep. 304; *Business Men's Ass'n v. Chicago, S. P., M. & I. R. R.*, 2 Int. Com. Rep. 41, 2 I. C. C. Rep. 52, 67; *Manufacturers & J. Union v. Minneapolis & S. L. R. R.*, 3 Int. Com. Rep. 115, 4 I. C. C. Rep. 79; *Hilton Lumber Co. v. Wilmington & W. R. R.*, 9 I. C. C. Rep. 17.

⁷² *Boney & Harper Milling Co. v. A. C. L. R. R.*, 28 I. C. C. 383.

⁷³ *Bluefield Shippers Ass'n v. N. & W. Ry.*, 22 I. C. C. 519.

⁷⁴ *Omaha Grain Exchange v. C. & N. W. Ry.*, 19 I. C. C. 424.

⁷⁵ *Arlington Heights Fruit Exchange v. S. P. Co.*, 22 I. C. C. 149.

⁷⁶ Stated in a note to *Ransome v. Eastern Counties Ry.*, 1 Eng. Ry. & Can. Traf. Cas. 63.

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lowering their fares and rates so as to compete with traffic by sea, by canal, or by a shorter or otherwise cheaper railway, and would thus deprive the public of the benefit of competition and the company of a legitimate source of profit. (b) It would prevent railway companies from making perfectly fair arrangements for carrying at a lower rate than usual goods brought in large and constant quantities, or for carrying for long distances at a lower rate than for short distances. (c) It would compel a company to carry for the same rate over a line which has been very expensive in construction, or which, from gradients or otherwise, is very expensive in working, at the same rate at which it carries over less expensive lines." In short, as our Commission equally well appreciates,⁷⁷ to impose equal mileage on the companies would be to deprive the public of the benefit of much of the competition which now exists or has existed, to raise the charges on the public in many cases where the companies now find it to their interest to lower them, and to perpetuate monopolies in carriage, trade, and manufacture in favor of those routes and places which are nearest and least expensive, where the varying charges of the company now create competition. Therefore, to consider the yield per ton per mile as wholly controlling in a particular case is equivalent to the fixing of rates on the basis of distance alone.⁷⁸ And comparisons of distance are of but little value in view of the well-known fact that the transportation conditions are very often wholly dissimilar.⁷⁹

§ 583. Rates in rough proportion to distance normally.

Generally speaking, it is perhaps fair to assume that distance should be controlling, where transportation conditions are substantially similar.⁸⁰ At all events, consider-

⁷⁷ *Receivers & Shippers Ass'n of Cincinnati v. C., N. O. & T. P. Ry.*, 18 I. C. C. 440.

⁷⁸ *District No. 1, Fort Smith, Ark., v. St. L. & S. F. R. R.*, 26 I. C. C. 541.

⁷⁹ *Goldfield Consolidated Milling & Transportation Co. v. A., T. & S. F. Ry.*, 26 I. C. C. 567.

⁸⁰ *Commercial Club of Superior v. G. N. Ry.*, 24 I. C. C. 96.

able differences in distance must always be taken into account;⁸¹ and if the difference in rates is out of proportion to the distances involved the Commission will be influenced by that fact.⁸² It has, for instance, been noted with approval by the Commission that local rates in C. F. A. territory are based on distance.⁸³ But any approval of distance rates depends upon the observance of the principle that, when distance increases, the per ton-mile revenue decreases.⁸⁴ And it follows that a mileage scale ordinarily yields a much higher rate in proportion for a short haul than for the long one.⁸⁵ Carriers, therefore, are entitled to charge higher per mile rates for shorter hauls than are proper to be charged for longer distances.⁸⁶ It is realized that a nearby point in a blanketed zone pays more per ton per mile than a more distant point.⁸⁷ And certainly a difference of 32 miles on hauls ranging from 600 to 1,000 miles is negligible.⁸⁸ In one proceeding recently the defendants contended that, so long as rates from farther distant points were greater in the aggregate than those from shorter distant points, no claim of discrimination could arise; but with this the Commission did not agree. Followed to its logical conclusion, it said, carriers would have the right to completely nullify distance, and give shippers far removed from consuming markets absolute control of prices in such markets, as against shippers located nearer thereto.⁸⁹ But in another case, decided about the same time, the Commission said that, under the conditions involved, rate construction on the per ton-mile basis would give to distance an exagger-

⁸¹ *Union Tanning Co. v. S. Ry.*, 26 I. C. C. 159. *v. C., B. & Q. R. R.*, 26 I. C. C. 638.

⁸² *Sims v. M. & W. R. R.*, 26 I. C. C. 275. ⁸³ *Metropolitan Paving Brick Co. v. A. A. R. R.*, 17 I. C. C. 197.

⁸⁴ *Indianapolis Freight Bureau v. Chicago C., C., & St. L.*, 23 I. C. C. 195. ⁸⁵ *Schmidt & Sons v. M. C. R. R.*, 19 I. C. C. 535.

⁸⁶ *Victor M'fg Co. v. S. Ry.*, 21 I. C. C. 222. ⁸⁷ *Montezuma v. C. of G. Ry.*, 28 I. C. C. 280.

⁸⁸ *Sheridan Chamber of Commerce* ⁸⁹ *Elk Cement & Lime Co. v. B. & O. R. R.*, 22 I. C. C. 84.

ated influence, resulting in relatively prohibitive rates beyond certain distances, and the elimination of competition.⁹⁰ As the situation now stands, therefore, it is certainly true that carriers are not required to disregard differences in distance.⁹¹ And, indeed, in cases where such action is clearly indicated, the Commission, in the absence of compelling circumstances, will prescribe distance rates.⁹²

§ 584. Construction of distance rates.

As has just been pointed out, distance rates are now not uncommonly recommended by Commission.⁹³ But it will sometimes be found that the establishment of rates on a mileage basis, instead of group adjustment, is not warranted by commercial conditions.⁹⁴ And it is clear enough that carriers are not required to disregard difference in distance.⁹⁵ Certainly if by doing so they cause unjust discrimination, they may not properly be required to do so.⁹⁶ Percentage rates, so called, are based upon distance; and the rates to the various percentage groups are determined by short-line mileage to the more important points located within those groups.⁹⁷ In giving explicit directions in a recent case, it was ordered that proportional class rates should be graded back across the State on the basis of a proportional scale of 55 cents between the rivers.⁹⁸ In another late case, it was pointed out that the rates to a certain point were properly in projection on the basis and method of computing the C. F. A. territory percentage scale.⁹⁹ Where the conditions are abnormal,

⁹⁰ *Alabama Coal Operators Ass'n v. S. Ry.*, 21 I. C. C. 230.

⁹¹ *R. R. Com. of Oregon v. S. P.*, 24 I. C. C. 273.

⁹² *Pulp & Paper Mfrs Traffic Ass'n v. C., M. & St. P. Ry.*, 27 I. C. C. 83.

⁹³ *Wharton Steel Co. v. D., L. & W. R. R.*, 25 I. C. C. 303.

⁹⁴ *In re Advances on Live Stock*, 25 I. C. C. 63.

⁹⁵ *Arizona Corporation Commis-*

sion v. A., T. & S. F. Ry., 28 I. C. C. 428.

⁹⁶ *Railroad Commission of Oregon v. S. P. Co.*, 24 I. C. C. 273.

⁹⁷ *Commercial Club of Superior v. G. N. Ry.*, 24 I. C. C. 96.

⁹⁸ *Springfield Commercial Ass'n v. P. R. R.*, 28 I. C. C. 511.

⁹⁹ *Interior Iowa Cities Case*, 28 I. C. C. 64.

it is urged that the direct line should not be used in figuring comparative mileages, as for instance where trains must be operated over heavy grades.¹ But the Commission cannot properly allow an unreasonable rate by the direct line, for the purpose of permitting the circuitous line to engage in the business at a reasonable profit.² Constructive mileage is often allowed in computing distance, as two miles for one in the case of water carriage.³ Dividing the valuation placed upon the bridge by the assessed valuation of defendant's line in Iowa and Illinois, it appeared in one case that such valuation represented the assessed value of $66\frac{1}{2}$ miles of line.⁴ Flat differentials are sometimes established for one city over another or one route in comparison with another.⁵ And similarly arbitraries for additional hauls are established without regard to exact distances.⁶ Differentials are sometimes established for different distances, but this system is falling into disfavor.⁷ It will be noted that when rates conform to length of haul they naturally increase as distance increases.⁸ For long-distance movement the rate should not, and ordinarily does not, increase for the last miles of that movement by the amount of the local rate for that distance.⁹ The structure upon which rates are established tends to shrink them with increasing distance, and they vanish when the mileage on which the differential is based becomes inconsiderable in proportion to total mileage from basing point to destination.¹⁰

¹ *Elgin Commercial Club v. B. & M. R. R.*, 28 I. C. C. 380.

² *Texarkana Freight Bureau v. St. L., I. M. & S. Ry.*, 28 I. C. C. 569.

³ *Grain Rates in C. F. A. Territory*, 28 I. C. C. 549.

⁴ *Southwestern Shippers' Traffic Ass'n v. A., T. & S. F. Ry.*, 24 I. C. C. 570.

⁵ *East Dubuque Supply Co. v. I. C. R. R.*, 28 I. C. C. 425.

⁶ *Omaha Grain Exchange v. C., R. I. & P. Ry.*, 28 I. C. C. 680.

⁷ *Schmidt & Sons v. M. C. R. R.*, 19 I. C. C. 535.

⁸ *Topeka Traffic Ass'n v. A. & V. Ry.*, 27 I. C. C. 428.

⁹ *Appalachia Lumber Co. v. L. & N. R. R.*, 25 I. C. C. 193.

¹⁰ *Sheridan C. of C. v. C., B. & Q. R. R.*, 28 I. C. C. 638.

§ 585. Bases of rate structure.

To consider yield per ton per mile as wholly controlling is equivalent to fixing of rates on basis of distance alone, which the Commission is not ready to do.¹¹ Moreover, as traffic is moved, the ton per mile revenue usually decreases as distance increases.¹² Differences in distance are relatively inconsiderable when rates are constructed and maintained upon the group system, and the subject-matter is a heavy commodity like coal.¹³ That rates are below the continuous-mileage scale is not conclusive of their unreasonableness.¹⁴ But rates are not infrequently prescribed by the Commission on a mileage basis.¹⁵ And graded rates recently have several times been substituted for blanket rates.¹⁶ According to the rate policies of the country now current the west bank of the Mississippi River is the west boundary of percentage zone based upon the rate between Chicago and New York as the 100 per cent territory; and all crossings, both upper and lower, are under percentage basis of rates with respect to traffic to and from points east of Buffalo and Pittsburgh.¹⁷ In the exercise of its power to see that traffic similarly circumstanced is handled without undue preference, the Commission has gone so far as to hold that in view of the well-established method of making rates in C. F. A. territory, Detroit was entitled to 78 per cent of the Chicago rate.¹⁸ The Mississippi River, as has been seen, is the axis of rate adjustment.¹⁹ And to restore the relation as between the gateways, ton-mile earnings on

¹¹ Board of Improvement v. St. L. & S. F. R. R., 26 I. C. C. 541. v. O. R. R. & N. Co., 21 I. C. C. R. 640.

¹² Truck Growers Ass'n v. A. C. L. R. R., 20 I. C. C. R. 190. ¹⁶ Re Wool Transportation, 23 I. C. C. 151.

¹³ Victor Mfg Co. v. So. Ry., 27 I. C. C. 661. ¹⁷ Mississippi River Case, 28 I. C. C. 47.

¹⁴ Middlesboro Board of Trade v. L. & N. R. R., 27 I. C. C. 14. ¹⁸ Delray Salt Co. v. Penn. R. R., 18 I. C. C. 259.

¹⁵ Portland Chamber of Commerce Ry., 27 I. C. C. 428. ¹⁹ Topeka Traffic Ass'n v. A. & V.

certain business may be in comparison with others low.²⁰ The construction of rates is pertinent in an inquiry only in the opportunity afforded to the Commission more minutely to examine the rate by consideration of its parts.²¹ Where the spread between the local rates and the division of through rates between the same points is large, the local rates should be carefully scrutinized.²² But further examination of the local rate fabric between certain points may indicate that the local rates are reasonably aligned.²³ However, the fact that the rates were advanced to preserve the relationship of rates, and not with the purpose of securing more revenue, has been held not to justify an advance.²⁴ For further examples of rate structure see the case holding that in banana rates in territory served through that port, the axis is New Orleans.²⁵ And note also the recent case on the concentration of cotton by a rate system designed to bring about that result.²⁶

§ 586. Different cost of haulage.

A difference in the ton-mile may be justified by varying cost of service on different parts of the line. Thus a higher ton-mile rate is justified on a haul which includes heavy grades.²⁷ In one recent proceeding it was pointed out that the general grade on Santa Fe from Gallup to Arizona points is downward, Gallup being 6,498 feet above sea level, and Phoenix, the southern terminus of the Prescott & Phoenix branch, 1,200 above sea level and this would justify differences in the rates in and out.²⁸ The uniform mileage rate may also be modified by the proximity of

²⁰ *Ohio River Hay Rates*, 27 I. C. C. 465.

²¹ *Kansas v. A., T. & S. F. Ry.*, 27 I. C. C. 673.

²² *Railroad Commission of Nev. v. N. C. O. Ry.*, 22 I. C. C. R. 205.

²³ *Omaha Grain Exchange v. C., R. I. & P. Ry.*, 28 I. C. C. 680.

²⁴ *Rates on Coal from Iowa to the Dakotas*, 26 I. C. C. 144.

²⁵ *Rates on Bananas from Gulf Ports*, 30 I. C. C. 510.

²⁶ *Re Concentration of Cotton*, 26 I. C. C. 585.

²⁷ *Rice v. Western N. Y. & P. R. R.*, 2 Int. Com. Rep. 319; *Brockway v. Ulster & D. R. R.*, 8 I. C. C. Rep. 21.

²⁸ *Arizona Corp. Com. v. A., T. & S. F. Ry.*, 28 I. C. C. 428.

fuel to one portion of the road.²⁹ In a peculiar case³⁰ decided some time ago, a rate on cattle in carload lots was attacked as too high. The defendant's road had a heavy grade on the western portion, but a very easy grade on the eastern portion; only 30 cars could be handled on the western portion, while on the eastern portion 60 cars could be handled. The defendant claimed therefore that the most economical method of carrying would be to run only half as many freight trains over the eastern portion; but as cattle trains must go directly through, this could not be done in the case of cattle. The Commission said, however, that the defendant seemed to claim that it ought to be allowed to charge a higher rate because if it sends this live stock through in proper time it cannot consolidate its trains at Boyce; but it was a novel idea that the rate should be advanced because the cost of operation over a part of the line is decreased.³¹

§ 587. Divisions built through a difficult territory.

When a road or part of a road is built through a mountainous country or other country which requires expensive construction, the charge may be greater than on other portions of the road or other roads where the cost of construction per mile is less. So where different rates were prescribed for railroads on the lower and on the upper peninsula of Michigan, this difference was held proper.³² The distinction between the roads of the upper and lower peninsulas was considered, in the absence of any showing to the contrary, to be a reasonable one. The court took judicial knowledge, for it is a matter of general knowledge, that the cost of building and running railroads in the upper peninsula is much greater than that in the lower,

²⁹ *New Orleans Cotton Exch. v. Illinois Cent. R. R.*, 2 Int. Com. Rep. 777, 3 I. C. C. Rep. 534.

³⁰ *New Orleans Live Stock Exchange v. T. & P. R. R.*, 10 I. C. C. Rep. 327.

³¹ *Compare Bellsdyke Coal Co. v. North British Ry.*, 2 Ry. & Can. Tr. Cas. 105.

³² *Morse, J., in Wellman v. Chicago & G. T. Ry.*, 83 Mich. 592, 47 N. W. 489.

owing to the marked physical difference between them in the character and face of the country. And in many cases the Commission has had occasion to point out that it is not possible to compare the ton-mile charge in the territory complained of with the charge in other territory, where traffic is more dense and the cost of operation is less.³³ The real question in any such complaint is the reasonableness of a particular rate on the particular line between the particular points in question. In testing such a rate the rates on the same or adjacent lines in the immediate territory where the same conditions exist are of much greater significance and afford a much more accurate basis for the Commission's action.³⁴ The fact that tonnage out of the Twin Cities southward is heavier than that of Sioux City northward was strongly urged in justification of a lower rate, but under the circumstances it was held that this fact would not suffice to overcome the firmly established principle of applying equal rates for equal distances under similar operating conditions, no substantial dissimilarity in this respect having been shown.³⁵

§ 588. Factors modifying distance rates.

It is well settled that, under the Act, competition may be considered in fixing the particular rate; and, if it may be considered under the Act, *a fortiori* it may influence the rate at common law.³⁶ This general problem is discussed elsewhere; it is enough, therefore, to give at this place one of the important limitations upon making a through rate less than a local rate. An intermediate local rate should never exceed the through rate to the terminus of the line plus the local rate back to the intermediate point.³⁷ A carrier may not properly or lawfully engage in transportation at a rate less than the cost of the service, since to do

³³ *Acme Cement Plaster Co. v. C. & N. W. Ry.*, 22 I. C. C. 112. C. G. Ry., 18 I. C. C. 19.

³⁴ *Dallas Freight Bureau v. G. C. & S. F. Ry.*, 12 I. C. C. 223. ³⁵ See *Texas & P. Ry. v. I. C. C.*, 162 U. S. 197, 40 L. ed. 940, 16 Sup. Ct. 666.

³⁶ *Sioux City Commercial Club v.* ³⁷ *Martin v. So. P.*, 2 I. C. C. 1.

so would place an improper and unlawful burden upon other traffic.³⁸ The future may compel greater recognition of distance in the making of rates, but the present business structure was not developed on that principle; and if a change is to be made, such change perforce must be a gradual one.³⁹ Competitive conditions, when shown to exist, may justify the fixing of rates, which are not in line with the rates to points where such competition does not obtain.⁴⁰ Taking the country as a whole, it is still true that rates are not made primarily upon considerations of mileage, but chiefly in view of competitive forces focused at certain points where the paths of commerce and the routes of transportation meet.⁴¹ Competition in commodities alone is not a circumstance that will entitle a selling point to have an already low rate made still lower to equal one at a more distant point, which was made to meet competition of carriers and of rates as well as of markets and products.⁴² The Commission should not, however, be understood as holding that a railroad must under all circumstances meet the rate of its competitor.⁴³ Carriers cannot be compelled, as a matter of law, to meet water competition; they do it of their own volition, or whenever the same is potent enough to compel them to do so in order to secure the traffic; in each instance the carrier determines for itself whether such water competition has sufficient influence on the traffic to make it reduce its rates.⁴⁴ But, while it is proper to consider the effect of a decision upon the general rate adjustment applying over a wide scope of territory, rates which discriminate against one locality on a particular road cannot be justified on the

³⁸ Burnham, Hanna, Munger Co. v. C., R. I. & P. Ry., 14 I. C. C. 299.

³⁹ Boileau v. P. & L. E. R. R., 24 I. C. C. 129.

⁴⁰ Rainey & Rogers v. St. L. & S. F. R. R., 18 I. C. C. 88.

⁴¹ Columbia Chamber of Commerce v. S. Ry., 28 I. C. C. 339.

⁴² Bovaird Supply Co. v. A., T. & S. F. Ry., 13 I. C. C. 56.

⁴³ North Bros. v. C., M. & St. P. Ry., 15 I. C. C. 70.

⁴⁴ Bainbridge Board of Trade v. L. H. & St. L. Ry., 15 I. C. C. 586.

ground that they are part of a general scheme, adopted by several roads entering the same territory and hauling from different and unassociated districts.⁴⁵

§ 589. Comparison of through rates and local rates.

A through rate may properly be less than the sum of the locals, although the cost of the service is the same, if the lower through rate is forced by competition which does not affect the local rates.⁴⁶ This is the reason that a continuous haul cannot ordinarily be as expensive as combined local hauls with their additional terminal services.⁴⁷ A carrier may even accept less for through service than a reasonable local rate.⁴⁸ In general, joint through rates are lower than the sum of the locals between two points; and obviously there can very seldom be any transportation reason why such should not be the case.⁴⁹ A joint through rate in excess of combination is, therefore, presumed unreasonable.⁵⁰ And a carrier cannot attempt to recoup itself by putting high locals on goods having low through in-bound rates.⁵¹ Higher rates may be made to points on a branch line, with proper limitations, than to main-line points.⁵² There is a material difference between a reasonable amount to be added for additional mileage on a straight-away long haul, and a reasonable allowance to be added for an out-of-line haul which involves two and probably three terminal services.⁵³ The fact that rates on other parts of the carrier's system are forced down by competition to a very low point, does not justify a higher rate to a point located on a branch line, since such point is

⁴⁶ *Black Mountain Coal Land Co. v. S. Ry.*, 15 I. C. C. 286.

⁴⁷ *R. R. Com. of Nev. v. N. C. O. Ry.*, 22 I. C. C. 205.

⁴⁸ *Kansas-Iowa Brick Rates*, 28 I. C. C. 285.

⁴⁹ *Boston Chamber of Commerce v. A., T. & S. F. Ry.*, 28 I. C. C. 230.

⁵⁰ *Laning-Harris Coal & Grain Co. v. Missouri P. R.*, 11 I. C. C. 154.

⁵¹ *Lull Carriage Co v. C. K. & S. Ry.*, 19 I. C. C. 15, 16.

⁵² *R. R. Comm. of Louisiana v. St. Louis S. W.*, 23 I. C. C. 31.

⁵³ *Idaho Commercial Clubs v. O. S. L. R. R.*, 18 I. C. C. 562.

⁵⁴ *Kansas City Transportation Bureau v. A., T. & S. F. Ry.*, 15 I. C. C. 491.

entitled to the reasonable rate which its location and other advantages dictate without taking into account conditions which bring about lower rates to other points.⁵⁴ While carriers are justified within proper limitations in making somewhat higher rates to branch-line points than to main-line points, where the same rate is applied to all points both on the main and branch lines, it is to be tested as a whole.⁵⁵

§ 590. Carriage in opposite directions.

There is no reason for requiring the same charge for carriage between the same points in opposite directions.⁵⁶ Various factors which properly enter into the rate may be different in the two cases. In a case⁵⁷ where a higher rate was charged for the eastward than for the westward carriage, the Commission said: "The claim is, in substance, that the rate of \$350 eastward is unreasonable in view of the fact that the rate over the same line and between the same points westward is only \$263. This fact alone is relied upon to support the charge. The two rates have no necessary connection or relation, and the fact that a rate over a road or line in one direction is materially higher than the rate on the same class of traffic over the same road or line and between the same points in the opposite direction does not, as in case of hauls over the same line in the same direction, establish *prima facie* the unreasonableness of the higher rate." On the other hand, where in the direction of lighter traffic a railroad is carrying many empty cars, it will be justified in lowering the rate in order to fill the cars. "When the preponderance of freight is so largely in one direction that the supply of empty cars exceeds the demand for return loads at full

⁵⁴ Board of Trade of Winston-Salem v. N. & W. Ry., 16 I. C. C. 12.

⁵⁵ Idaho Commercial Clubs v. O. S. L. R. R., 18 I. C. C. 562.

⁵⁶ Macloon v. Boston & M. R. R., 9 I. C. C. Rep. 642.

⁵⁷ Duncan v. Atchison, T. & S. F. R. R., 6 Int. Com. Rep. 85, 102, 4 I. C. C. 385.

rates, it is not unlawful to encourage business by affording transportation on less profitable terms." ⁵⁸ The fact that a rate in one direction is lower than the rate in the opposite direction is not of itself a justification for advancing the former rate. ⁵⁹

§ 591. Passenger fares generally on mileage basis.

No such principles generally prevail in establishing passenger fares. These are usually made upon a mileage basis, and do not decrease inversely with the distance as in freight rates. This was brought out in a remarkable case before the Interstate Commerce Commission,⁶⁰ where the through interstate rate was found to be more than the combined local intrastate rates. The Commission expressed no great disapprobation of this, saying simply: "From the local passenger tariff and distance table in effect on the Charleston & Savannah Railway on and after September 1, 1896, it appears that interstate passenger fares between Savannah and South Carolina points commence with 3 cents per mile to or from Sand Island, S. C., 20 miles from Savannah, and with slight variations increase with distance up to a mileage rate of 3.86 cents to Fetteressa, 105 miles from Savannah and 10 miles from Charleston. The mileage rate between Savannah and Charleston, as stated above, is 3.826 cents. While in freight service the general rule is that the rate per ton per mile should decrease as distance increases, in passenger service a single mileage rate for all distances is often found to prevail. It is unusual to find either freight or passenger rates per mile increase with distance." ⁶¹

⁵⁸ *James v. East Tennessee V. & G. R. R.*, 2 Int Com. Rep. 609, 3 I. C. C. Rep. 225.

⁵⁹ *In re Advances on Potatoes*, 25 I. C. C. 247.

⁶⁰ *Savannah Bureau v. Charleston*

& Savannah Ry., 7 I. C. C. Rep. 601.

⁶¹ Through passenger business can be carried at lower rates than strictly local business. *Commercial Club of Salt Lake City v. A., T. & S. F. Ry.*, 19 I. C. C. R. 218.

Topic D. Grouping Stations and Basing Points

§ 592. The system of grouping.

The railroad might make a separate rate for each station on its line, so that a charge must be established for each possible combination of two termini. This is the natural rule, and not an unreasonable one. But for various reasons it has become usual to group together for the purpose of fixing rates a number of neighboring stations, and make a uniform charge for any station in the group. The most extensive blanketing of rates known applies in the trans-continental tariffs, the rates, for instance, being found in one proceeding to be the same to the Pacific Coast from all points east of Colorado Common Point territory.⁶² And the Commission has said that it is by no means certain that postage-stamp rates, as applied to the distribution of the products of the Pacific Coast States, are not upon the whole for the general public good.⁶³ It should be noted also that distance is largely disregarded in so far as the North Atlantic port differential adjustments are concerned.⁶⁴ So common has this practice become, that it is often looked upon as natural; and one city has sometimes demanded as a right that it should be grouped with a neighboring city. For instance, Omaha applied to the Commission to be grouped with Council Bluffs (which is situated at the other end of a long and expensive bridge over the Missouri River), and to be given identical rates from Iowa points; but the Commission held that there was no legal right to have stations grouped, and that a difference in rate was justified.⁶⁵

§ 593. Distances considered in grouping.

All points must be considered in determining reasonable-

⁶² *Arlington Heights Fruit Exchange v. S. P. Co.*, 22 I. C. C. R. 149.

⁶³ *Indianapolis Freight Bureau v. C., C., & St. L. Ry.*, 23 I. C. C. R. 195.

⁶⁴ *Chamber of Commerce of New York v. N. Y. C. & H. R. R. R.*, 24 I. C. C. 55.

⁶⁵ *Commercial Club of Omaha v. Chicago & N. W. Ry.*, 7 I. C. C. Rep. 386.

ness of group rates.⁶⁶ The propriety of a grouping must in any case depend on the peculiar facts and conditions upon which it is predicated.⁶⁷ Any grouping, whether of rates, localities, or commodities must not be unreasonable or result in unjust discrimination.⁶⁸ In every zone rate, the near-by point pays a proportionally higher rate than a more distant point.⁶⁹ Distance is an important, but not necessarily a controlling factor, in rate questions; whether or not it is conclusive depends upon the facts in the case.⁷⁰ It does not necessarily follow, that a carrier not competing for traffic in this way thereby subjects itself to an order compelling it to do so.⁷¹ If strictly distance rates were applied to grain moving from points of origin, it is apparent that at a certain distance the rate would be prohibitive.⁷² Length of haul and other transportation factors have a more or less definite relation to the rate that a carrier may reasonably demand for a transportation service.⁷³ But it has been held that the voluntary extension of reasonable rates to points much more distant is not of itself unlawful.⁷⁴ And, although it is often said that distance is always a factor in determining reasonableness of rate, this is always qualified by saying that distance is not necessarily controlling.⁷⁵ It seems to be agreed that larger blankets are justified for longer distances than would be permitted where shorter distances are involved.⁷⁶ When carriers are given permission to change from the mileage

⁶⁶ *Beall v. W. A. & M. V. Ry.*, 20 I. C. C. 406.

⁶⁷ 26 I. C. C. 515.

⁶⁸ *Sun. Co. v. I. S. R. R. Co.*, 22 I. C. C. 194.

⁶⁹ *Schmidt & Sons v. M. C. R. R.*, 19 I. C. C. 535.

⁷⁰ *Muskogee Traffic Bureau v. A., T. & S. F. Ry.*, 17 I. C. C. 169.

⁷¹ *Hydraulic Press Brick Co. v. St. L. & S. F. R. R.*, 13 I. C. C. 342.

⁷² *Kansas City Transportation Bu-*

reau v. A., T. & S. F. Ry., 16 I. C. C. 195.

⁷³ *Memphis Cotton Oil Co. v. I. C. R. R.*, 17 I. C. C. 313.

⁷⁴ *Northwest Leather Co. v. O. I. R.*, 21 I. C. C. 66.

⁷⁵ *Corporation Commission of N. C. v. N. & W. Ry.*, 19 I. C. C. R. 303.

⁷⁶ *Mutual Rice Trade & Development Ass'n v. I. & G. N. R. R.*, 23 I. C. C. 219.

basis to the group basis it is usually insisted that the short hauls shall be properly provided for.⁷⁷

§ 594. Grouping must be reasonable.

While grouping is permissible in a proper case, it must nevertheless be reasonable; the Commission cannot approve a blanket rate which imposes upon any point an unreasonable burden.⁷⁸ Carriers have followed the principle that whenever distance between certain points constitutes a relatively small percentage of distance between any of those points and ultimate market, such originating points should be grouped for rate-making purposes.⁷⁹ Where grouping is reasonably done, the shorter distances to the markets may be determined by the average distances from the points reached by two or more systems; and where there is no such point in a group the distance should be computed from a point centrally located.⁸⁰ In stating rates between remote sections, territorial groups of considerable extent must be employed; and differences in distance of several hundred miles are frequently disregarded under the blanket plan of rate making.⁸¹ The boundary line to mark the limits of application of blankets rates may not be so artificially drawn as to subject shippers immediately outside the favored zone to unjust discrimination.⁸² Even when grouping is resorted to in order to preserve competition in commodities, as where railroads entering New York grouped the stations which supplied the city with milk, it was held that it would be unreasonable to make a uniform rate for all milk stations to New York, but reasonable to establish zones at proper intervals by which all milk from stations up to a certain distance, say 40 miles, should pay the same rate, then all

⁷⁷ *In re Advances on Cottonseed Products*, 25 I. C. C. 237.

⁷⁸ *Switzer Lumber Co. v. K. C. S. Ry.*, 25 I. C. C. 611.

⁷⁹ *Rates on News Print Paper from Sault Ste. Marie, Ont.*, 26 I. C. C. 13.

⁸⁰ *Superior Commercial Club v. G. N. Ry.*, 25 I. C. C. 342.

⁸¹ *In re Advances on Barley*, 24 I. C. C. 664.

⁸² *Southern Furniture Mf'rs Ass'n v. S. Ry.*, 25 I. C. C. 379.

milk originating in the zone from 40 miles to 60 miles a slightly higher rate, and so on.⁸³ The Commission has often approved blanket rates covering wide areas, but always with the reservation either that no one was objecting, or that a substantial reason for that adjustment had been shown.⁸⁴ And in a recent proceeding the blanket system of making rates on wool from the west to eastern points was ordered broken up and graded rates established.⁸⁵

§ 595. Testing reasonableness of grouping.

Whether or not the grouping of points of origin or points of destination constitutes undue or unjust discrimination, must be determined from the facts in each case.⁸⁶ In all cases of blanket or group rates, there is of necessity more or less disregard of distance, and varying degrees of inequality, but such inequalities are not of necessity unreasonable or unjust, when the situation is viewed from every standpoint, taking into account all interests.⁸⁷ Because the revenue per ton per mile yielded by rates from farther distant points is less than that yielded by rates from a shorter distant point, it does not necessarily follow that the latter is subjected to unjust discrimination.⁸⁸ The unreasonableness of a rate cannot be established by comparing it with the rate to a point situated at the farther edge of territory taking a blanket rate, when the purpose of the comparison is to show the rates charged with respect to distances involved are unfair.⁸⁹ It is inevitable that in every blanket or zone rate, the near-by point pays a proportionally higher rate than the more distant point.⁹⁰ In comparison with, or in passing upon the reasonable-

⁸³ *Mills Producers Ass'n v. D., L. & W. R. R.*, 7 I. C. C. 92.

⁸⁴ *Transportation Bureau of Wichita v. St. L. & S. F. R. R.*, 23 I. C. C. 679.

⁸⁵ *In re Transportation of Wool, Hides and Pelts*, 23 I. C. C. R. 151.

⁸⁶ *Muskogee Traffic Bureau v. A., T. & S. F. Ry.*, 17 I. C. C. 169.

⁸⁷ *Chicago Lumber & Coal Co. v. T. S. Ry.*, 16 I. C. C. 323.

⁸⁸ *Indianapolis Freight Bureau v. C., C., & St. L. Ry.*, 15 I. C. C. 504.

⁸⁹ *Bash Fertilizer Co. v. Wabash R. R.*, 18 I. C. C. 522.

⁹⁰ *Schmidt & Sons v. M. C. R. R.*, 19 I. C. C. R. 535.

ness of, a blanket rate neither extreme of the group should be considered, but rather a fair average.⁹¹ As long as rates are made under the group system, the distance theory must be modified.⁹² In passing upon reasonableness of a blanket rate, the rate to the nearest point must be offset against that to the more distant point.⁹³ Extravagant rates ought not to be imposed upon 90 per cent of traffic in group upon pretext that more favorable rate is granted to other 10 per cent.⁹⁴ Under its enlarged powers the Commission has held a blanket adjustment under which rates from the east are higher to Spokane than to Pacific Coast terminals held to be violation of the Act, so far as they exceed certain zone rates prescribed by the Commission.⁹⁵ But no reason was apparent to the Commission in a recent proceeding for disturbing blanket arrangement under which rates on hides from California to Michigan are as high as rates from California to the Atlantic seaboard.⁹⁶

§ 596. Uniform rate to a group of stations.

Although it may be conceded that a slightly greater profit will be made on a traffic passing to the nearest grouped point than to the furthest point, the difference, if the stations are properly grouped, will not be sufficient to make the arrangement illegal. It is clear that the grouping must be so managed that the rate to the nearest point will not be unreasonable in itself, and the rate to the furthest point will be remunerative. Grouping is often justified in order to preserve competition in commodities carried to market, where a strict mileage rate would give

⁹¹ *Oregon & Washington Lumber M'frs Co. v. S. P. Co.*, 21 I. C. C. R. 389.

⁹² *McCloud River Lumber Co. v. S. P. Co.*, 24 I. C. C. 89.

⁹³ *Commercial Club of Salt Lake City v. A., T. & S. F. Ry.*, 19 I. C. C. R. 218.

⁹⁴ *Southwestern Missouri Millers' Club v. M., K. & T. Ry.*, 22 I. C. C. R. 422.

⁹⁵ *City of Spokane v. N. P. Ry.*, 21 I. C. C. R. 400.

⁹⁶ *Northwestern Leather Co. v. O. R. R. & N. Co.*, 21 I. C. C. R. 66.

too great an advantage to the commodities produced at the nearest point to the market. Upon broad grounds of public policy, this is permitted in order to best develop the resources of the country. Upon these principles it was held reasonable to group all the mines in a certain locality, such as the Lehigh anthracite coal region.⁹⁷ These general principles are well set forth in the quotation which follows.⁹⁸ "It is said by way of argument that there is an inherent injustice in carrying the product of one locality at a less rate than that of another which lies nearer to the common market, because in that case the nearer shipper pays a part of the expense of transporting the freight of his rival a longer distance upon the same train. This result does not necessarily follow, however. In cases where the rate is sufficiently high to afford a reasonable profit upon each portion of the traffic by itself, there are no losses upon the longer portion of the route to be made up by overcharges upon the remainder."

§ 597. Commutation rates for suburban passengers.

In the case of fares for passengers the system of grouping finds its scope in the rates given commuters, and the principles under discussion apply well to passenger fares as to freight rates. The Act itself, by express proviso, permits the issuance of commutation tickets. It cannot be said, therefore, that such rates are discriminatory in themselves, either against persons paying regular fares, or places outside the territory covered by such a system of rates.⁹⁹ Ordinarily the price of commutation tickets, and the conditions upon which they are sold, as well as the distance to which they shall extend, are matters within the discretion of the carrier. But here, as elsewhere, the final word is with the Commission, as to all matters connected

⁹⁷ *Coxe v. Lehigh Valley R. R.*, 3 Int. Com. Rep. 460, 4 I. C. C. Rep. 535.

⁹⁸ *Walker, Com.*, in *Howell v. New*

York, L. E. & W. R. R., 2 Int. Com. Rep. 162, 2 I. C. C. Rep. 272.

⁹⁹ *Sprigg v. Baltimore & Ohio R. R.*, 8 I. C. C. 443; see also *Beall v. W. A. & M. V. Ry.*, 20 I. C. C. 406.

with these charges, as in the case of other fares. Thus, the Commission has been deciding all along that the system of commutation fares is not in itself unduly prejudicial.¹ The most important action of the Commission in regard to this matter has been its recent course in relation to the interstate commutation rates in the region surrounding the city of New York. In the earlier case the fares for New Jersey commuters were very fully treated.² And in the later case it was held by that comparison with other fares the commutation fares of the New York, New Haven & Hartford from points in Connecticut into New York City were unreasonable, except as to certain stations.³

§ 598. How basing points are established.

Instead of grouping stations about a competitive point and charging a uniform rate, it is more customary now to fix a certain rate to the competitive point (called the basing point), and to fix rates to other points in the group by adding in each case to the basing rate the local rate from that point to the station in question. Such a combination rate is on the face of it unreasonable, and it will be closely scrutinized. The competitive rate to the basing point plus the local is at any rate the extreme limit of charge.⁴ A basing point was in a recent proceeding before the Commission described by defendants' witness as "where there is considerable freight."⁵ The fact that a city is a Mississippi River gateway considered in determining the reasonableness of its rates.⁶ Where the establishment of a

¹ *Boyle v. G. F. & O. D. R. R.*, 20 I. C. C. 232; see also *Byzer v. W. Va. Ry.*, 20 I. C. C. 406.

² *Commutation Rate Case*, 21 I. C. C. 428; see also *Suburban Rate Cases*, 26 I. C. C. 398.

³ *Commutation Rate Case*, 27 I. C. C. 549; this proceeding has no relation to similar proceedings in the interstate rates.

⁴ *Trammell v. Clyde S. S. Co.*, 4 Int. Com. Rep. 120, 5 I. C. C. 324; *Cordele Machine Shop v. Louisville & N. R. R.*, 6 I. C. C. 361; *Gustin v. Atchison, T. & S. F. R. R.*, 8 I. C. C. 277; *Board of Trade v. Central of Ga. Ry.*, 8 I. C. C. Rep. 142.

⁵ *Arkansas Fertilizer Co. v. St. L., I. M. & S. Ry.*, 25 I. C. C. 266.

⁶ *City of Montezuma v. C. of G. Ry.*, 28 I. C. C. 280.

basing point system is justified by the circumstances affecting the rating of traffic at the point in question, an additional charge may properly be made for a back haul.⁷ According to the present doctrines of the Commission it does not follow that joint through rates over long distance to local or non-competitive points shall now be made by adding to basing point rates either the full locals or high differentials; on the contrary in making joint through rates on such traffic it is insisted that differentials or arbitraries above rates to basing points should bear some reasonable relation to total distances involved.⁸ It will be noted, therefore, that, under the basing point system, the key to the making of the rate is "the rate breaking point," which will necessarily command the jobbing business of the tributary territory.⁹ As the law stands, therefore, a rate to and from an intermediate point, higher by the local than the in-bound rate to a trade center, will not necessarily be condemned.¹⁰ An illustration of the working of the basing point system may be seen in a recent proceeding when it appeared that the rate to Douglas from the west is made up of the rate to Brunswick plus the rate from Brunswick back to Douglas, these rates being determined by competition of water lines from the eastern ports and rail lines through the Virginia gateways.¹¹ Likewise it transpired in another proceeding that class and commodity rates to Texarkana from certain territory are made by adding differentials to the rates from St. Louis or Kansas City, which are taken as basing rates.¹² The Ohio River crossings are basing points for rates to points north, and reduction in rates at crossings will cause change in joint rates to beyond.¹³

⁷ *Speigle v. S. Ry.*, 25 I. C. C. 71.

⁸ *Board of Trade of Carrollton v. C. of G. Ry. Co.*, 28 I. C. C. 154.

⁹ *Wichita B. of T. v. A., T. & S. F. Ry.*, 30 I. C. C. 35.

¹⁰ *Durham v. I. C. Ry.*, 12 I. C. C. 37.

¹¹ *Mayor & Council of Douglas v. A. B. & A. R. R.*, 28 I. C. C. 445.

¹² *Texarkana Freight Bureau v. St. L., I. M. & S. Ry.*, 28 I. C. C. 569.

¹³ *Davis Bros. Lumber Co., Ltd., v. C., R. I. & P. Ry.*, 26 I. C. C. 257.

And similarly the Missouri River is taken as the basing point in establishing proportional rates to interior cities of Iowa.¹⁴

§ 599. Whether basing points justified.

It was not until several years after the passage of the Act that the Supreme Court of the United States held that this system of making rates upon basing points was legal. It should be noted that at first after the passing of the Interstate Commerce Act, it was believed that section 4 would automatically prevent the reducing of a rate for a long haul below that for a shorter haul included in it; and, therefore, competitive points were grouped with a number of intermediate points, so that the carrier might compete without reducing his charge below intermediate charges. But as soon as it was decided that a carrier might in case of competition reduce the charges for a long haul below those for a short haul, this has become unnecessary, and the competitive points are now made basing points.¹⁵ In the leading case justifying the basing point systems it appeared in the record that rates to non-competitive Georgia towns were arrived at by taking the Atlanta rate and adding to it the local rate back. The result of this was to make a higher rate in each case for the shorter haul; but all the rates were lower than they would be if the nearest competitive point to the west, Montgomery, had been taken as the basing point. The court upheld the rates, Mr. Justice White saying:¹⁶ "It having been established

¹⁴ Interior Iowa Cities Case, 28 I. C. C. 64.

¹⁵ East Tenn., Va. & Ga. Ry. v. Interstate Commerce Commission, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. 516.

From basing points, through rates to ports are made by adding to rate to basing point, an "arbitrary." Aransas Pass Channel & Dock Co. v. G. H. & S. A. Ry., 27 I. C. C. 403.

See further as to rate structure under a basing system, La Grange C. of C. v. A. & W. R. R., 28 I. C. C. 178.

¹⁶ Interstate Commerce Commission v. Louisville & N. R. R., 190 U. S. 273, 47 L. ed. 1047, 23 Sup. Ct. 687.

It is under the theory of the propriety of reducing rates to meet competition at certain points that the basing point system of rate mak-

that competition affecting rates existing at a particular point (Atlanta) produced the dissimilarity of circumstances and conditions contemplated by the 4th section of the Act, we think it inevitably followed that the railway companies had a right to take the lower rate prevailing at Atlanta as a basis for the charge made to places in territory contiguous to Atlanta, and to ask, in addition to the low competitive rate, the local rate from Atlanta to such places, provided thereby no increased charges resulted over those which would have been occasioned if the low rate to Atlanta had been left out of view."

§ 600. Determination of base rate.

The Commission may examine into the elements from which a rate is constructed, and, if, as in one of the earlier cases, it finds that the base rates of \$4 per 100 pounds from Omaha to Denver and of \$4.25 per 100 pounds from Denver to Ogden are excessive it may take action thereon.¹⁷ Thereafter such a rate becomes adjudicated for other purposes; and it will be urged, for example, that the 38-cent rate from Chattanooga to New York is "an adjudicated basic rate" and as high as it reasonably might be.¹⁸ The Commission has recently held that a rate adjustment under which cement rates are blanketed over a minimum distance of 213 miles and over a maximum distance of 475 miles, is not necessarily to be condemned.¹⁹ And, indeed, differences in distance of much more than 264 miles are frequently disregarded under the blanket plan of making transcontinental rates.²⁰ The Commission recognizes the difference in the rate adjustment east and

ing may be defended against the allegation of undue preference as between localities. *Board of Trade of Carrollton v. C. of G. Ry.*, 28 I. C. C. 154.

The fact that a city is a Mississippi River gateway is considered in basing the rate. *Montezuma v. C. of Ga. Ry.*, 28 I. C. C. 280.

¹⁷ *Kindel v. Adams Exp. Co.*, 11 I. C. C. 475.

¹⁸ *Union Tanning Co. v. S. Ry.*, 26 I. C. C. 159.

¹⁹ *In re Advances on Cement*, 24 I. C. C. 209.

²⁰ *In re Advances on Barley*, 24 I. C. C. 664.

west of the Mississippi River, and has held that the basis obtaining west may properly be on a higher scale than that obtaining east.²¹ And Chicago, because of traffic conditions imperatively demanding recognition, has been recognized as a natural point for breaking rates.²² In all rate groups there must necessarily be a more or less abrupt "rate hump" as between the most distant point in one group and the nearest point in the adjoining group.²³ Group rates being based on distance, the difference should decrease as the distance to points of destination increase; and as between points embraced within the same group the percentage of distance over or under the average distance of the group to point of destination should not be excessive.²⁴ On the other hand, when the basing point is established at certain common points, with differential rates added for other points, there is a possibility of discrimination.²⁵ If the complaining places are all in active competition with the near-by basing points, and are adversely affected by the advantages which the latter enjoy in the matter of freight rates, the matter deserves scrutiny.²⁶ It may be noted as an illustration of the distinction between these opposed systems of rate making that rates east of the Missouri River are blanketed with respect to non-water competitive freight, but not as to rates affected by water competition.²⁷

§ 601. Extent of power over grouping.

As the carriers have evidently considered at all times in their rate making that certain economic conditions exist which require grouping, the Commission cannot ignore these conditions in determining the reasonableness of rates

²¹ In re Advances on Apples, 24 I. C. C. 38. ²² In re Docket 38 and 38 A, 21 I. C. C. R. 591.

²³ Globe Milling Co. v. C., M. & St. P. Ry., 24 I. C. C. 594. ²⁴ Texas Common Points Case.

²⁵ Taylor v. N. W. Ry., 25 I. C. C. 613. ²⁶ Pelham v. A. C. L. R. R., 28 I. C. C. 433.

²⁷ In re Investigation and Suspension Docket 38 and 38 A, 21 I. C. C. R. 591. ²⁸ Transcontinental Commodity Rates, West Bound, 26 I. C. C. 456.

prevailing for various points within the group.²⁸ Indeed, it has been said repeatedly that group rates not infrequently are the most just, and promote the highest degree of healthy competition.²⁹ As a matter of policy the system of grouping should be encouraged, and growers should have as free and unrestricted a field as possible in which to establish their credit and purchase the supplies necessary to conduct their business.³⁰ It is plainly undesirable to disturb a method of rate making, long established and generally satisfactory, without convincing proof of its injustice.³¹ The rate structure as worked out in practice will ordinarily make rates break at ports and on the banks of rivers; but to have rates break at a particular point, even if conditions are much the same, is not an inherent rate right.³² The Commission has conceded that a governmental authority has not the same latitude in fixing blanket rates as the carriers themselves.³³ But it has said shrewdly that if the courts should rule that the Commission had no authority to establish blanket rates in territory, it would seem to follow that the carriers are without authority.³⁴ However, the Commission went ahead prescribing rates which would presumably result in blanketing the points of origin between localities mentioned.³⁵ And while the Commission often approved blanket rates, blanket rates have been condemned where they result in unreasonable charges.³⁶ Until very recently the Commission felt it would be inopportune to proceed upon the theory that it had power to establish a blanket rate generally applicable.³⁷ But after the decision in the

²⁸ *Victor Mfg Co. v. S. Ry.*, 27 I. C. C. 661.

²⁹ *Waukesha Lime & Stone Co. v. C., M. & St. P. Ry.*, 26 I. C. C. 515.

³⁰ *Concentration of Cotton*, 26 I. C. C. 585.

³¹ *Acme Cement Plaster Co. v. L. S. & M. S. Ry.*, 17 I. C. C. 30.

³² *Commercial Club of Duluth v. B. & O. R. R.*, 27 I. C. C. 639.

³³ *R. R. Commission of Nev. v. S. P. Co.*, 19 I. C. C. R. 238.

³⁴ *Lawrence-Wardenburg Co. v. S. P. Co.*, 20 I. C. C. R. 638.

³⁵ *Stacy & Sons v. O. S. L. R. R.*, 20 I. C. C. R. 136.

³⁶ *Commercial Club of S. L. v. A., T. & S. F. Ry.*, 19 I. C. C. 218.

³⁷ *Arlington Heights Fruit Exchange v. S. P.*, 22 I. C. C. 149.

Lemon Rates Case,³⁸ it was obvious that if it acted with due caution, it would be safe to follow out the zone policy when the conditions were favorable. And in the Inter-mountain Rates Case,³⁹ it would seem to have been made sufficiently clear that the Commission can give relief by establishing zones, if that is appropriate.

§ 602. Creation of a market by preferential rates.

Only to a certain extent the carrier may be allowed to favor a new town, and thereby create a new market and stimulate competition.⁴⁰ "The Louisville & Nashville insists that the near-by market of Pensacola is entitled to all of this great advantage. It claims that the lower rates to Pensacola were necessary to create a market there for these stores, and, further, that the carriage to Pensacola is only part of its haul on the great majority of the shipments, while on shipments to Savannah it can only have the short haul to River Junction, where it must turn the traffic over to one of its connecting roads. Whatever difference in rates may have seemed necessary at the outset to create a demand in the Pensacola market, it is apparent now, after several years' trial, that the rates to Savannah as compared with the Pensacola rates give an unwarranted advantage to Pensacola. In endeavoring to build up a near-by market at Pensacola, and so furnish these products with a market in addition to the one existing at Savannah, the Louisville & Nashville was acting in the interest of producers of and dealers in naval stores on its Pensacola & Atlantic division. It went beyond this, however, and so controlled the adjustment of

³⁸ Interstate Commerce Commission v. A., T. & S. F. Ry., 231 U. S. 736, 34 Sup. Ct. 316.

³⁹ United States v. A., T. & S. F. Ry., 234 U. S. 476, 34 Sup. Ct. 986.

⁴⁰ Savannah Bureau of Freight & Transportation v. Louisville & N. R.

R., 8 I. C. C. Rep. 377, affirmed in 118 Fed. 613.

No jobbing point is entitled, through unfair rate adjustment, to supremacy in a particular consuming territory. Billings Chamber of Commerce v. C., B. & Q. R. R., 19 I. C. C. 71.

rates to the two markets as to give Pensacola a practical monopoly of the trade. A carrier cannot lawfully establish and maintain an adjustment of rates which in practice prevents shippers on its line from availing themselves of a principal market which they have long been using, and confers a substantial monopoly upon a new market in which, for reasons of its own, it has greater interest. That is what has been done in this case."⁴¹

§ 603. Equalizing manufactures in different localities.

To a certain extent subject to many limitations discussed elsewhere, a railroad management may equalize the access of manufacturers in different near-by localities to their sources of supply so that all may compete upon equal terms in common markets. That this tends to promote distribution of manufacturing industries, which has its advantages, may be admitted, but the extent to which the common carrier may be permitted to play the part of a beneficent despot is a question. The Commission has never approved a group system which imposed upon any part of group an unjust and unreasonable or unduly discriminating transportation charge.⁴² It has held, for example, in regard to any basing system that the intermediate rate should not exceed the long-distance rate, plus a reasonable local charge from the more remote point back to intermediate point, and should, perhaps, in some cases be even less.⁴³ In a territory under the basing point system, rates to a complaining point, made by a combination of the

⁴¹ The Commission has repeatedly recognized and approved the grouping of points, within reasonable limits. *Stiritz v. N. O. M. & C. R. R.*, 22 I. C. C. 578.

Every city is entitled to the advantage of its location, and may not lawfully be subjected to high freight charges merely because carriers for reasons of convenience or otherwise include it with a number of other

points in surrounding territory, which latter points are not similarly situated. *Corporation Commission of North Carolina v. N. & W. Ry.*, 19 I. C. C. 303; decision of Commission sustained, *N. & W. Ry. v. U. S.*, 195 Fed. 953.

⁴² *Southwestern M. Millers' Club v. M., K. & T. Ry.*, 22 I. C. C. 422.

⁴³ *Bluefield Shippers' Ass'n v. N. & W. Ry.*, 22 I. C. C. 519.

through rate to the nearest trade center and the local beyond need not, under the construction of the fourth section of the act by the Supreme Court, be reduced to the basis of every neighboring point of like distance, when the other points have the advantage of water or other competition.⁴⁴ And, indeed, the authorities are now quick to appreciate that the rapid increase of rates as the point of production is removed from base points presents an anomaly in rate making which calls for explanation.⁴⁵ And the Commission has laid it down that, if the basing point system is adopted, it must be applied alike to all places where real dissimilarity of circumstances or controlling competition do not exist.⁴⁶ Thus where three towns are strong competitors, it is important to have a common rate, if the conditions justify it.⁴⁷ And it is improper to place a particular commodity in a given zone without due regard to geographical boundaries of production.⁴⁸ It is realized, however, that blanket or group rates in many cases are of great advantage to the public without serious injustice to any interest, though there is of necessity more or less disregard of distance and varying degrees of inequality.⁴⁹ A basing point is established that all roads might share in the business and all shippers be given opportunity to compete in common markets.⁵⁰ Indeed, the chief justification for a blanket rate is that it places all producers on the same footing at a market.⁵¹

⁴⁴ Commercial & I. Ass'n of Union Springs v. L. & N. R. R. Co., 12 I. C. C. 372.

⁴⁵ Florida F. & V. S. P. Ass'n v. A. C. L. R. R., 22 I. C. C. 11.

⁴⁶ Columbia Grocery Co. v. L. & N. R. R., 18 I. C. C. 502.

⁴⁷ Railroad Commissioners of Fla. v. S. A. L. Ry., 16 I. C. C. 1.

⁴⁸ Ferguson Saw Mill Co. v. St. L., I. M. & S. Ry., 18 I. C. C. 391.

⁴⁹ Chicago Lumber & Coal Co. v. Tioga Southeastern Ry., 16 I. C. C. 323.

⁵⁰ Avery Manufacturing Co. v. A., T. & S. F. Ry., 16 I. C. C. 20.

⁵¹ Ferguson Saw Mill Co. v. St. L., I. M. & S. Ry., 18 I. C. C. 396.

BOOK III
PREVENTION OF DISCRIMINATION
PART I—WHAT CONSTITUTES DISCRIMINATION

CHAPTER XIII

GENERAL PRINCIPLES RELATING TO DISCRIMINATION

- § 610. Provisions of the Act.
- 611. Development of the rule against discrimination.

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- § 612. Nothing but reasonableness once required.
- 613. No rule against discrimination as such.
- 614. Later rule against unreasonable differences.
- 615. Outright discrimination next condemned.
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- 617. Special concessions from established rates.
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§ 610. Provisions of the Act.

One of the chief objects of the passing the original Act was to make it clear that discrimination between persons shipping goods under like conditions was illegal. At that time the decisions in the courts of the States were in conflict; and it was even doubtful whether there was any rule generally applicable against rebating in the case of interstate shipments. Every addition since that time to the law has been in the line of additional remedies to prevent rebating; but the rule against it was made plain enough in the original Act, section 2, which, together with certain clauses in section 3 hereafter discussed, relate particularly to discrimination between shippers. This section provided in sweeping terms that if any common

carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carriers shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful. There are specific provisions of the older section 22, and the newer paragraph added to section 1, relating to free transportation or carriage at reduced rates for certain classes or purposes in the case of persons and goods. Generally speaking, such concessions may still be made for governmental purposes and other community interests. And free passes may, furthermore, still be given by carriers to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law; and free transportation may also be interchanged between officials of companies subject to the Act. What in general is held to constitute illegal discrimination under the Act, and the machinery put at the disposal of the Commission to stamp it out, is discussed at large throughout the four chapters immediately following.

§ 611. Development of the rule against discrimination.

The fundamental limitation upon the charges of a common carrier, that they shall be in no respect unreasonable, has just been discussed with much detail. But a further requirement of the public service law governing the rates of the common carrier remains to be considered, and that is the more modern requisite that rates shall be in no respect unjustly discriminatory. It must be plain to all

who have followed the course of events with the least attention that there has been distinct evolution in the law governing public employment during the last twenty-five years. The rule against discrimination is the most recent development in the definition of public duty. A comparatively few years ago it was held that if a public service company served at reasonable rates it performed its obligation; but modern industrial conditions require the further law that it shall serve with equality. The statement that one is a common carrier, *ex vi termini*, imports a duty to the public, and a corresponding legal right in the public, a right common to all. One of the duties imposed upon the common carrier is, that he is bound to carry for a reasonable remuneration, and is not allowed to make unreasonable and excessive charges. He cannot, like a merchant, consult his pleasure or caprice in the conduct of his business, and cannot even by special agreement receive an excessive and extortionate price for his services. Another duty imposed upon him is to make no unjust, injurious or arbitrary discriminations between individuals in his dealings with the public. The right to the transportation services of the carrier is a common right belonging to every one alike.

Topic A. Successive Theories as to Discrimination

§ 612. Nothing but reasonableness once required.

The state of the law as to this matter at the middle of the nineteenth century is well set forth in the important case of *Fitchburg Railroad v. Gage*.⁵² The principal issue in this case was whether the railroad could charge one shipper a fifty cent rate on ice from one point on its route to another while it was charging another shipper a twenty cent rate on brick for the same transportation. It will be seen that this case really involves no question of personal discrimination, since these are obviously very different goods which are being shipped over the route.

⁵² 12 Gray (Mass.), 393.

Still the language of the court in stating what was at that time conceived to be the common law is often cited. "The principle derived from that source is very plain and simple. It requires equal justice to all. But the equality which is to be observed in relation to the public and to every individual consists in the restricted right to charge, in each particular case of service, a reasonable compensation, and no more. If the carrier confines himself to this, no wrong can be done, and no cause afforded for complaint. If, for special reasons, in isolated cases, the carrier sees fit to stipulate for the carriage of goods or merchandise of any class for individuals for a certain time or in certain quantities for less compensation than what is the usual, necessary, and reasonable rate, he may undoubtedly do so without thereby entitling all other persons and parties to the same advantage and relief."⁵³

§ 613. No rule against discrimination as such.

It has already been pointed out that up to twenty-five years ago the prevalent doctrine was that there was no rule against discrimination as such, unless it was shown that the higher charge was unreasonable. One of the frankest cases in making that distinction was *Ex parte Benson & Co.*,⁵⁴ where the court permitted the recovery of a rebate promised to certain shippers to induce them to ship by rail rather than by river. The language of Chief Justice Simpson leaves no doubt as to his belief: "The extent of the common law rule seems to be, not that carriers shall transport for all parties at the same rate of compensation, otherwise their contracts are illegal and void, but that they shall transport at reasonable rates to all. A difference in the charge does not *per se* invalidate the contracts as inequitable and against public policy, but to have this effect, there must be an element of unreasonableness in the charge itself, as applied to the services

⁵³ See also *Ragan & Buffet v. Aiken*, 9 Lea (77 Tenn.), 609. ⁵⁴ 19 S. C. 38, 44 Am. Rep. 564.

rendered, between the parties to the contract and without comparison to the charges against others. Independent of statutes and provisions in their charters restricting corporations within certain limits, they stand in the community as other individuals invested with the power to contract and be contracted with, and the validity of their contracts depends upon the same principles which govern contracts between natural persons. It is too vague to say, in general terms, that the contract is inequitable and against public policy, and, therefore, not enforceable. To be void on such grounds, it must run contra to some known principle of equity or contravene some well-established doctrine of public forbidding it.”⁵⁵

§ 614. Later rule against unreasonable differences.

For a considerable time thereafter this remained the prevailing statement of the extent of the limitations which the law placed upon the charges of the carrier. Indeed, as new cases arose the courts committed themselves to still more definite statements. Thus in the case of *Johnson v. Pensacola and Perdido Railroad Company*⁵⁶ the court refused to grant reparation to a complainant who showed that while they were charging him one rate for transportation of lumber they were charging another shipper one-third less for the same transportation under circumstances and conditions in all respects that were essential entirely similar. Mr. Justice Westcott in delivering the opinion of the court held this declaration demurrable by the weight of authority. “Our conclusions,” he said, “are that, as against a common or public carrier, every person has the same right; that in all cases, where his common duty controls, he cannot refuse A and accommodate B; that all, the entire public, have the right to the same *carriage at a reasonable price, and at a reasonable charge for the service performed*; that the commonness

⁵⁵ Of the cases cited in the preceding section see, especially, *Houston*

& *T. C. Ry. v. Rust & D.*, 58 Tex. 98.

⁵⁶ 16 Fla. 623, 26 Am. Rep. 731.

of the duty to *carry for all* does not involve a commonness or equality of compensation or charge; that all the shipper can ask of a common carrier is, *that for the service performed he shall charge no more than a reasonable sum to him*; that whether the carrier charges another more or less than the price charged a particular individual, may be a matter of evidence in determining whether a charge is too much or too little for the service performed, and that the difference between the charges cannot be the measure of damages in any case, unless it is established by proof that the smaller charge is the true reasonable charge in view of the transportation furnished, and that the higher charge is excessive to that degree.”⁵⁷

§ 615. Outright discrimination next condemned.

Even in so extreme a case as the one last cited some qualifications were made; the power to discriminate as much as it pleased between shippers was not left to the railroads. For even then it was vaguely felt that equal service to all dealers upon fair terms was necessary for the maintenance of free industrial conditions. And the courts never went so far that they could not be continually more insistent that they had meant that reasonable rates to all must be equal rates to all unless the conditions were shown to be dissimilar. This is the position still taken in some States where there has been no declaration or policy by statute against discrimination as such; but it will be seen that to a large extent it prevents discriminatory rates as well as unreasonable charges. An elaborate case decided under this view of the law is *Cook v. Chicago, Rock Island and Pacific Railway Company*.⁵⁸ In that case it appeared that the plaintiffs, who were shippers of cattle, were charged by the defendant from three to ten dollars per carload of cattle shipped more than the charges made to certain favored shippers who were given a secret

⁵⁷ See *Concord & P. R. R. v. Forsaith*, 59 N. H. 122, 47 Am. Rep. 181. ⁵⁸ 81 Ia. 551, 46 N. W. 749, 25 Am. St. Rep. 512, 9 L. R. A. 764.

rebate. The court held that the railroad must make reparation for this wrong by refunding these overpayments thus extorted. The course of opinion in the two of the most prominent text writers of the last generation may be seen in the following extract from the opinion of Chief Justice Rothrock: "In volume 2, p. 95, Redfield on Railroads, the following language is used: 'It has been held in this country, where there is no statutory regulation affecting the question, that common carriers are not absolutely bound to charge all customers the same price for the same service. But as the rule is clearly established at common law that a carrier is bound by law to carry everything which is brought to him, for a reasonable sum to be paid to him for the same carriage, and not to extort what he will, it would seem to follow that he is bound to carry for all at the same price, unless there is some special reason for the distinction. For, unless this were so, the duty to carry for all would not be of much value to the public, since it would be easy for the carrier to select his own customers at will by the arbitrary discrimination in his favor. Hence, it was held at an early day that all that could be required on the part of the owner of the goods, by way of compensation, was that he should be ready and willing to pay a reasonable compensation, and to deposit the money in advance, if required. Carrying for reasonable compensation must imply that the same compensation is accepted always for the same service, else it could not be reasonable, either absolutely or relatively.' In Hutchinson on Carriers, 243, after a review of the cases, it is said: 'Hence we may conclude that in this country, independently of statutory provisions, all common carriers will be held to the strictest impartiality in the conduct of their business, and that all privileges or preferences given to one customer, which are not extended to all, are in violation of public duty.' An examination of the authorities cited by these learned authors leaves no doubt that a common carrier has no right to make un-

reasonable charges for his services, and that he cannot lawfully make unjust discrimination between his customers.”⁵⁹

§ 616. Exclusiveness of the privilege creates discrimination.

In a similarly inconclusive case, *Christie v. Missouri Pacific Railroad Company*,⁶⁰ where a petition alleged that a contract was made with the agent of a railroad company regarding the shipment of grain at a reduced price, stating its terms, it was held that nothing appeared to show that the arrangement was against public policy, Chief Justice Norton saying: “A common carrier has the right to contract to ship freight at a lower rate than the published tariff rate, if he choose to do so; and such a contract is not against public policy unless the privilege to ship at such rate is granted exclusively to the shipper with whom it is made, or is denied to other shippers. It is the exclusiveness of the privilege granted to one and denied to another which makes the discrimination, and renders the contract void as against public policy. No such exclusiveness or discrimination appears in the contract sued upon, and the objection of defendant to the reception of any evidence was properly overruled.”⁶¹

§ 617. Special concessions from established rates.

Even in some comparatively recent cases, these general doctrines are stated in much the same language as formerly. Thus in *Lough v. Outerbridge*,⁶² in holding that a common carrier might grant special reductions in pursuance of a policy to maintain its business in the face of competition, the court held that those who would not conform to the conditions had no complaint if they were not given the reduced rates. “There can be no doubt that

⁵⁹ See *Cowden v. Pacific S. S. Co.*, 94 Pac. 470, 29 Pac. 873, 28 Am. St. Rep. 142, 18 L. R. A. 221.

⁶⁰ 94 Mo. 453, 7 S. W. 567.

⁶¹ The case of *Toledo, W. & W. R.*

Co. v. Elliott, 76 Ill. 67, was relied upon by the court.

⁶² 143 N. Y. 271, 38 N. E. 292, 42 Am. St. Rep. 712, 25 L. R. A. 674, B.

& W. 380.

the carrier could at common law make a discount from its reasonable general rates in favor of a particular customer or class of customers in isolated cases, for special reasons, and upon special conditions, without violating any of the duties or obligations to the public inherent in the employment. If the general rates are reasonable, a deviation from the standard by the carrier in favor of particular customers, for special reasons not applicable to the whole public, does not furnish to parties not similarly situated any just ground for complaint. When the conditions and circumstances are identical, the charges to all shippers for the same service must be equal. These principles are well settled, and whatever may be found to the contrary in the cases cited by the learned counsel for the plaintiff originated in the application of statutory regulations in other States and countries. Special favors in the form of reduced rates to particular customers may form an element in the inquiry whether, as matter of fact, the standard rates are reasonable or otherwise. If they are extended to such persons at the expense of the general public, the fact must be taken into account in ascertaining whether a given tariff of general prices is or is not reasonable." ⁶³

§ 618. Complainant charged more than regular rates.

However, it is now generally agreed that in outrageous cases relief will be given by some one or other of these principles. In one of the most extreme cases in the books, *Menacho v. Ward*,⁶⁴ it was set forth by the shippers in their application for relief that the carrier in question had arbitrarily refused them equal terms, facilities and accommodations to those granted and allowed to other shippers, and had arbitrarily exacted from them a much greater rate of freight than he was at the same time charg-

⁶³ Citing *Railroad Co. v. Gage*, 12 Gray, 393; *Sargent v. Railroad Co.*, 115 Mass. 422; *Steamship Co. v. McGregor*, 21 Q. B. Div. 544, affirmed, 23 Q. B. Div. 598, and by

H. L. 17 App. Cas. 25; *Evershed v. Railway Co.*, 3 Q. B. Div. 135, affirmed, L. R. 3 App. Cas. 1029.

⁶⁴ 27 Fed. 529.

ing to shippers of merchandise generally. It appeared that these shippers had thus been "blacklisted" because they maintained business relations with a rival carrier. But the court found this no excuse for charging the complainants more than the regular rates, Judge Baxter, although still believing as the majority of people then believed that the law did not require any greater equality than that no shipper should be charged an unreasonable rate, nevertheless finding upon the evidence that the complainants had been treated outrageously. "The fact that the carrier charges some less than others for the same service is merely evidence for the latter, tending to show that he charges them too much; but when it appears that the charges are greater than those ordinarily and uniformly made to others for similar services, the fact is not only competent evidence against the carrier, but cogent evidence, and shifts upon him the burden of justifying the exceptional charge."⁶⁵

§ 619. All discrimination forbidden by the better view.

By the better view, it is submitted, the common law to-day forbids all discrimination between two applicants who ask the same service of a common carrier. This is the modern view reached after some bitter experiences with the results of discriminations by the railroads in disturbing the normal industrial order, in suppressing competition and fostering monopoly. But over thirty years ago this doctrine, that there is a necessary common-law rule against discrimination involved in the law defining the public duty of the common carrier, was stated in a way which has never been improved upon. In the leading case of *Messenger v. Pennsylvania Railroad Company*⁶⁶ Mr. Justice Beasley said in part: "Recognizing this as the settled doc-

⁶⁵ This distinctive rule against unjustifiable discrimination was recognized in *Rothschild v. Wabash, St. L. & P. R. R.*, 92 Mo. 91, 4 S. W. 418.

⁶⁶ 7 Vroom (36 N. J. L.), 407, 13 Am. Rep. 437, S. C. 8 Vroom (37 N. J. L.) 531, 18 Am. Rep. 754.

trine, I am not able to see how it can be admissible for a common carrier to demand a different hire from various persons for an identical kind of service, under identical conditions. Such partiality is legitimate in private business, but how can it square with the obligations of a public employment? A person having a public duty to discharge, is undoubtedly bound to exercise such office for the equal benefit of all, and therefore to permit the common carrier to charge various prices, according to the person with whom he deals, for the same services, is to forget that he owes a duty to the community. If he exacts different rates for the carriage of goods of the same kind, between the same points, he violates, as plainly, though it may be not in the same degree, the principle of public policy which, in his own despite, converts his business into a public employment. The law that forbids him to make any discrimination in favor of the goods of A over the goods of B, when the goods of both are tendered for carriage, must, it seems to me, necessarily forbid any discrimination with respect to the rate of pay for the carriage." ⁶⁷

§ 620. Necessity for the rule against discrimination.

By the modern way of looking at this matter, therefore, discrimination is illegal. In last analysis it is public opinion which has dictated this rule, although it is not too much to claim that this rule is a logical development in the law of public duty. So involved are the services of the common carrier, directly or indirectly, in all modern businesses that it is already felt to be unbearable if transportation is not open to all upon equal terms. And the rule must be exact. It is not enough to say that all must be given rates which are not unreasonable, for by that principle in many cases unequal rates might be justified.⁶⁸

⁶⁷ See also *Sandford v. Catawissa, W. & E. R. R.*, 24 Pa. St. 378, 64 Am. Dec. 667.

⁶⁸ *Chicago & A. R. R. v. People*, 67 Ill. 16, 16 Am. Rep. 599.

What public opinion requires to-day is that the rates shall be equal; if they are different by a few cents upon a hundredweight it may mean the fortune of the shipper who gets the lower rate, and the ruin of his competitor who pays the higher rate. The cases requiring the same rate to shippers who ask for the same transportation of the same goods at the same time and under the same conditions may seem fewer in number than those which are more conservative. But this principle was made law in many States by an impatient public who demanded statutes so that there could be in the future no equivocations, before many courts had time to express their opinion and before other courts had time to recant. And upon the whole it is claimed with confidence that outright personal discrimination is opposed to modern common-law principles.⁶⁹

§ 621. Rule forbidding personal discrimination.

It is submitted that for the reasons advanced in these last paragraphs, if for no other reasons, it is a necessary part of the common law governing common carriers that they must not discriminate between shippers; and it must be plain that this involves the recognition of a rule forbidding discrimination which goes beyond the prior rule requiring reasonable charges. It was not easy to work this out logically, since it did involve a development in the law governing public service. How cautious many courts were in working the new rule out may be seen by an extract from the opinion of Judge Bruce in *Samuels v. Louisville and Nashville Railroad Company*,⁷⁰ where the court sustained on demurrer a complaint which stated discrimination, but did not allege unreasonable charge: "But the question in this case is to be determined upon the common law, and in the light of those principles as applied to railroad companies. In a case like the one at

⁶⁹ See the language in *Griffin v. Goldsboro Water Co.*, 122 N. C. 206, 30 S. E. 319, 41 L. R. A. 240.

⁷⁰ 31 Fed. 57.

bar, can there be a reasonable charge which is not at the same time a substantially equal charge? And is not a charge unreasonable when it is unequal, and in breach of the obligation and duty of the common carrier to the public?"⁷¹

§ 622. Public injury by discriminations in freight rates.

The argument from policy against discrimination is so plain to anyone who has not been out of touch with the recent developments in the industrial situation that it is hardly necessary to elaborate it. But a succinct statement from a recent decision by Judge Grosscup,⁷² where he held that under its general chancery jurisdiction, a court of equity has power to remedy wrongs consisting of the violation by a carrier of the provisions of the interstate commerce law prohibiting discrimination between shippers, brings out well the necessity for the protection of the whole public in having the benefits of an open market. "The bill avers—and this hearing is upon demurrer and motion for an injunction—that such discrimination was practiced in the transportation of grains and of packing house goods; and that in the transportation of grain it had gone so far that each railroad reaching into the grain districts had eliminated all competitive dealers, leaving only a single favored dealer who purchased all the grain at all the stations along the lines of the roads. Of course under such conditions, the grain grower was deprived of the benefit of competition among dealers. The practical effect was the same as if the railroads had established agencies of their own to purchase the grain, and by giving these discriminatory advantages, had excluded all other grain purchasers from the field. Such a policy necessarily destroys the competition to which the grain growers in a given district are entitled. Discrimination of this charac-

⁷¹ See also *Burlington C. R. & W. Ry. v. N. W. Fuel Co.*, 31 Fed. 652. ⁷² *United States v. Michigan Central R. R.*, 122 Fed. 544.

ter is, of course, contrary to the plain provisions of the interstate commerce act." ⁷³

§ 623. Policy of the Act.

The Commission has had occasion to remark that in the passing of the Act one important purpose was to stop discrimination against the weak in favor of the strong.⁷¹ It has spoken also with emphasis of the boon of free competition, which the Act is designed to secure to all, large and small.⁷⁵ The fundamental principle of the Act is clearly that there should be equal treatment to all alike under the substantially similar conditions and circumstances.⁷⁶ While one object of the Act was to preserve competitive conditions between common carriers for the public benefit, another purpose was to prevent undue discrimination for private protection.⁷⁷ Carriers are common servants of all shippers, and are bound to serve them all reasonably and without undue prejudice.⁷⁸ It is the duty of a common carrier to receive and carry, upon reasonable and equal terms, all goods tendered, under suitable circumstances and conditions, and it cannot lawfully discriminate in favor of any person, product, traffic or locality.⁷⁹ Whether or not a discrimination shall be removed is not measured by its amount, whether large or small, but it is unjust or undue.⁸⁰ Again and again it has been laid down that it is the duty of the carrier to transport for all without undue preference or property.⁸¹ Equal treatment is nowhere more clearly laid down in the Act than in sec-

⁷³ See *Re Charge to Grand Jury*, 66 Fed. 146, in regard to the demoralization caused by distributing free passes.

⁷⁴ *In re Rates on Salt*, 24 I. C. C. 192.

⁷⁵ *Chamber of Commerce of New York v. N. Y. C. & H. R. R. R.*, 24 I. C. C. 55.

⁷⁶ *Cambria Steel Co. v. B. & O. R. R.*, 15 I. C. C. 484.

⁷⁷ *Railroad Commission of Tennessee v. A. A. R. R.*, 17 I. C. C. 418.

⁷⁸ *Avery Mfg. Co. v. A., T. & S. F. Ry.*, 16 I. C. C. 20.

⁷⁹ *Standard Lime & Stone Co. v. Cumberland Valley R. R.*, 15 I. C. C. 620.

⁸⁰ *Fort Dodge Commercial Club v. I. C. R. R.*, 16 I. C. C. 572.

⁸¹ *National Petroleum Ass'n v. L. & N. R. Co.*, 15 I. C. C. 473.

tions 2 and 3, to the test of which all questions of preference or priority should be referred first of all.⁸² The word contemporaneous in these sections means at the same time with the offending rates; and as long as these rates remain in force the services rendered to a complaining and to a favored shipper are contemporaneous within the meaning of the Act.⁸³ Altogether the fundamental principle of the Act in the view of the Commission is one of fair play; a railroad cannot nowadays put in force preferences or priorities, even though by following such course of procedure it can develop the greatest amount of traffic for itself.⁸⁴ Such business policies, it is at last realized after bitter experience, are inconsistent with the fundamental duties of common carriers.

Topic B. What Constitutes Statutory Discrimination

§ 624. What amounts to a rebate.

Not only are the outright discounts and the obvious rebates of the earlier time illegal, but any device by which the charge to a shipper is made less than the schedule rate is now held to be discrimination. Thus free cartage for the collection and delivery of freight for certain shippers only has been held by the Supreme Court to be an illegal rebate.⁸⁵ And an unpublished allowance to certain shippers of a certain sum for the use of their private sidings, has long been considered by the federal courts as a case of illegality.⁸⁶ As such obvious devices have thus become too dangerous, more elaborate schemes have developed for getting an advantage in rates. Thus many large concerns have organized, often as a separate concern, an industrial railway from their premises to the trunk line. They may thus attempt to pose as a connecting carrier,

⁸² *Rail & River Coal Co. v. B. & O. R. R.*, 14 I. C. C. 86.

⁸³ *Wight v. United States*, 167 U. S. 512, 42 L. ed. 258, 17 Sup. Ct.

⁸⁴ *Re Underfilling*, 1 Int. Com. Rep. 813, 1 I. C. C. 633.

822.

⁸⁵ *Mobile Chamber of Commerce v. M. & O. R. R.*, 23 I. C. C. 417.

⁸⁶ *Chicago & A. Ry. v. United States*, 156 Fed. 558.

and not only obtain from the trunk line a division of the rate to market but that disproportionately large share which the originating carrier gets.⁸⁷ Another late scheme is the organization of a dummy transportation company by a manufacturing company to carry its products to market, getting as payment not only the rental of their special cars at extraordinarily high rates but a virtual commission for furnishing the business.⁸⁸ It is needless to say that the courts have now become too sophisticated to be thus imposed upon. Indeed rebating in all its forms has now become a very smoky sin indeed, and anyone who is concerned in it will be smutted. The cases cited in this section are noted only by way of illustration without any attempt to make in this place anything like a comprehensive statement of principles involved. Indeed, it will take nothing less than a study of the eight chapters constituting this Book to gain any idea of the scope of these rules at the present day.

§ 625. Prohibition of special rates.

Since its work of administering the Act began, the Commission has never had any question that any device by which the charge to a patron is made less than the scheduled rate is a rebate, and is forbidden by the Act.⁸⁹ Even if it is a practice of which others may avail themselves, a discount allowed to shippers of a certain amount of goods within a year is objectionable.⁹⁰ So free cartage for the collection and delivery of freight, not mentioned in the published schedule, is an illegal rebate.⁹¹ And even if published, if open only to certain customers, it is illegal in itself.⁹² So the practice of allowing a tank shipper of

⁸⁷ See *United States v. Atchison, T. & S. F. R. R.*, 142 Fed. 176.

⁸⁸ See *United States v. Milwaukee Refriger. Transit Co.*, 145 Fed. 1007.

⁸⁹ *Re Boston & M. R. R.*, 3 Int. Com. Rep. 793.

⁹⁰ *Providence Coal Co. v. Providence & W. R. R.*, 1 Int. Com. Rep. 363.

⁹¹ *Stone v. Detroit, G. H. & M. Ry.*, 3 Int. Com. Rep. 60, 3 I. C. C. 613.

⁹² *Hezel Milling Co. v. St. Louis, A. & T. H. Ry.*, 3 Int. Com. Rep. 701, 5 I. C. C. 57.

oil an arbitrary deduction of a certain number of gallons per tank car is wholly indefensible, when no corresponding allowance is made for leakage and evaporation from shipments in barrels.⁹³ So the employment of brokers or scalpers as a device to give low rates is illegal; and sales by such brokers at less than tariff rates are forbidden.⁹⁴ And a device by which a rebate running to the benefit of those whom the carrier is seeking to favor will not defeat the Act.⁹⁵ Section 2 of the Act prohibits charging to one a greater or less compensation than is charged to another for a like and contemporaneous service under substantially similar circumstances and conditions.⁹⁶ It was the purpose of section 2 to enforce equality between shippers, and it prohibits any rebate or other device by which two shippers shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor.⁹⁷

§ 626. Explanation of this policy.

Thus the statute provides a complete system. It prevents rebating by making the published rate obligatory on all concerned, and it gives relief from unfair published rates by complaint to the Commission. This policy is thus emphasized in a recent opinion:⁹⁸ "The object of the statutes relating to interstate commerce is to secure the transportation of person and property by common carriers for reasonable compensation. No rate can possibly be reasonable that is higher than anybody else has to pay. Recognizing this obvious truth, the law requires the carrier to adhere to the published rate as an absolute standard of uniformity. The requirement of publication is

⁹³ *Rice v. Western N. Y. & P. R. R.*, 3 Int. Com. Rep. 162, 4 I. C. C. 131.

⁹⁴ *Re Passenger Tariffs*, 2 Int. Com. Rep. 445, 2 I. C. C. 649.

⁹⁵ *Re Underbilling*, 1 Int. Com. Rep. 813, 1 I. C. C. 633.

⁹⁶ *In re Advances in Demurrage Charges*, 25 I. C. C. 314.

⁹⁷ *In re Advances on Manganese Ore*, 25 I. C. C. 663.

⁹⁸ *State v. Chicago & A. Ry.*, 148 Fed. 648.

imposed in order that the man having freight to ship may ascertain by an inspection of the schedules exactly what will be the cost to him of the transportation of his property; and not only so, but the law gives him another and a very valuable right, namely, the right to know, by an inspection of the same schedule, exactly what will be the cost to his competitor of the transportation of his competitor's property." Still more emphatic is the language in a later case:⁹⁹ "Effective railroad rate regulation must begin with publicity of rates. To be public the rates must be laid before the Interstate Commerce Commission, must be kept in the stations of the carriers for the information of the public, and must also be printed in such form that they shall be intelligible to the average shipper upon examination. All of this was perceived by the lawmakers 20 years ago, and the rules, based upon these considerations, then written into the law, have continued unchanged, except as they have been from time to time strengthened and amplified."

§ 627. What discrimination is forbidden.

The discrimination forbidden by the Act is not confined to any one form of unfair dealing. It need not be accomplished by any particular device; and, on the other hand, no device will prevent an unreasonable preference from being unlawful.¹ It includes preference in rates:² in classification:³ and in the furnishing of facilities.⁴ The discrimination must be actual, not merely contemplated, as by offering a discriminative rate which is not accepted⁵ or by giving a concession to a shipper which is not shown

⁹⁹ *United States v. Illinois Terminal Co.*, 168 Fed. 546.

2 Int. Com. Rep. 15, 3 I. C. C. 435.

¹ *Scofield v. Lake Shore & M. S. R. R.*, 2 Int. Com. Rep. 67, 2 I. C. C. 90.

⁴ *Re Morris*, 2 Int. Com. Rep. 617.

³ *United States v. Tozer*, 37 Fed. 635, 2 Int. Com. Rep. 597, on appeal, 39 Fed. 904.

⁵ *Lehigh Valley R. R. v. Ramey*, 112 Fed. 487. See also *Griffie v. Burlington & M. R. Ry.*, 2 Int. Com. Rep. 194; *Richmond Elevator Co. v. Pere Marquette R. R.*, 10 I. C. C. Rep. 629.

² *Bates v. Pennsylvania R. R.*,

to have been refused to any other shipper.⁶ The Act applied only to the future; it did not embrace cases which occurred before it was passed.⁷ Section 2 embodies the phrase, "under substantially similar circumstances and conditions," but this might be included in the words "in any respect whatsoever" contained in section 3.⁸ Every effort of the carriers to compel accuracy and honesty in description of freight deserves support; conscious misrepresentations are misdemeanors and criminal, and should be rigorously suppressed.⁹ Any regulation or practice that withdraws from a shipper the equal opportunity of using and taking advantage of the rates offered by a carrier to the public, is clearly a regulation or practice affecting rates in the sense in which that phrase is used in the Act as amended in 1906.¹⁰ Where a shipper is located in a district to which a uniform rate has been applied, he is entitled to the same rates as any other shipper in the district, although his shipments may be originated by a different railroad than that serving the other shippers.¹¹

§ 628. Departure from published rate.

The Act requires carriers to publish their tariffs and to adhere to those tariffs; in no other way could discriminations which had existed be prevented; and, therefore, in enforcement of these provisions the Commission has no discretion.¹² Failure on the part of the shipper to pay, or of the carrier to collect, the full freight charged based upon the lawfully published rate for the particular movement between two given points, constitutes a breach of

⁶ *United States v. Ganley*, 71 Fed. 672.

⁷ *Ottinger v. Southern Pac. R. R.*, 1 Int. Com. Rep. 607, 1 I. C. C. 144.

⁸ *Board of Trade of Carrollton v. C. of G. Ry. Co.*, 28 I. C. C. 154.

⁹ *Western Classification Case*, 25 I. C. C. 442.

¹⁰ *Rail and River Coal Co. v. B. & O. R. R. Co.*, 14 I. C. C. 86.

¹¹ *Pennsylvania R. R. v. International Coal M. Co.*, 173 Fed. 1.

¹² *Ames Bros. Co. v. Rutland R. R.*, 16 I. C. C. 479.

the law, regardless of the rate inserted in a bill of lading.¹³ The word "discrimination" as used in the Elkins Act is employed in its common sense, as well as with whatever enlarged or more definite meaning the context of the amendment of 1906 gives to it; thus a shipper who is permitted to settle his charges by paying a "less or different compensation" to the carrier is accepting or receiving a "discrimination."¹⁴ In a prosecution under this Act against a shipper for the acceptance of a concession, it is for the court, and not for the jury, to determine whether documents filed with the Commission are sufficiently definite to establish the rate in question between the points in question.¹⁵ If inequality results from the exaction of a special rate to one shipper, and a different rate to another upon like traffic contemporaneously transported under substantially similar circumstances and conditions, section 2 is violated.¹⁶ The paramount duty under the Act is to avoid discrimination or the suspicion of any device to work a discrimination.¹⁷

§ 629. Sanctity of the scheduled rate.

The strict provisions against rebating contained in the Act are based upon an ingenious, and apparently effective plan. A schedule of rates, prepared by the carrier, must be filed with the Commission, and duly published, as it required.¹⁸ When this has been done, the rate so scheduled cannot be changed by the railroad, without the filing and sufficient publication of a new rate. The doctrine is carried to such an extent that, even if a shipper is at first charged a lower rate quoted him by a freight agent, he can be compelled to pay the difference between

¹³ *Poor Grain Co. v. C., B. & Q. Ry.*, 12 I. C. C. 118.

¹⁴ *U. S. v. Sunday Creek Co.*, 194 Fed. 252.

¹⁵ *Standard Oil Co. of New York v. U. S.*, 179 Fed. 614.

¹⁶ *Moran & Son v. Mo. Pac. Ry.*, 11 I. C. C. 598.

¹⁷ *R. R. Com. of La. v. St. L. S. W. Ry.*, 23 I. C. C. 31.

¹⁸ Due publication of rates may be required by legislation. *Stone et al. v. Yazoo & M. V. R. R.*, 62 Miss. 607.

this and the scheduled rate.¹⁹ If the rate so published is unreasonable in itself, or otherwise disproportionate, nevertheless the shipper cannot accept, nor the railroad grant, a departure from it.²⁰ The shipper's remedy is a complaint to the Commission, which will result, if successful, in a reduction for the future, and in damages for past unfair exactions. It follows that not only are rebates to favored individuals without any basis of justification made criminal, but even special rates for granting concessions for good reasons, if they have not been publicly offered. And it is also criminal for railroads or shippers to receive or give less than the published rates, even though both parties agree that the published rates are unreasonable and discriminatory. Indeed, it is easy to see that any power to the parties concerned to alter the published rates on the ground that they are illegal, would put an end to the effectiveness of the whole Act. The scheduled and published rate is a public record, back of which no party can go until it is altered in the ways provided by the Act.²¹

§ 630. Devices for concealing preference unavailing.

As has been seen, no device to conceal the preference can operate to evade the statute. Thus underbilling, a device by which a shipper pays for the transportation of a less quantity of freight than is actually carried, and thereby obtains a reduced rate upon the gross shipment, is plainly with the ban of the Act.²² So the failure to furnish cars ratably in time of shortage, is regarded by the Commission as an unreasonable preference under its

¹⁹ The leading case is *Texas & P. R. R. Co. v. Mugg*, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. 828, discussed in Chapter XXII, *infra*.

²⁰ The leading case is *Texas & P. Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. 350, discussed in Chapter XXII, *infra*.

²¹ How far shippers are affected with familiarity with schedules which they are invited to inspect may be seen in *Mannheim Ins. Co. v. Erie & W. Tr. Co.*, 72 Minn. 357, 75 N. W. 602.

²² In *re Underbilling*, 1 Int. Com. Rep. 813, 1 I. C. C. 633.

provisions.²³ A complainant was unjustly discriminated against by defendant's refusal to provide cars for the shipment of cross ties, while it did furnish cars to other persons for the interstate shipment of lumber, stone, and many other freight articles, and also supplied cars for the shipment of cross ties destined almost entirely for its own use.²⁴ And, for obvious reasons, the payment of an unreasonable rent for the use of cars furnished by shippers creates an unreasonable preference.²⁵ The Commission cannot sanction any theory of rate making on which a rate is published with the intention of having it used only by one shipper, or only for articles to be employed in a special undertaking, and cancelling it when it is discovered that the rate is to be shipped under by others.²⁶ Where a carrier agrees to make a lower rate, lowers the rate after the movement begins, and then cancels it after the movement discontinues, the lower rate established is on its face in the form of a rebate, giving special privileges to a certain shipper, who has special knowledge of the lowering of the rate.²⁷

§ 631. Certain unlawful devices considered.

Under the Elkins Act making it criminal for a shipper, by any device whatever, to secure the transportation of property at a less rate than that named in the tariffs published and filed by the carrier, it is not necessary to support a conviction that the preference be obtained by fraudulent schemes or devices, or by dishonest or underhanded methods, since the term "device" includes anything which works a plan or contrivance.²⁸ In such

²³ *Richmond Elevator Co. v. Pere Marquette R. R.*, 10 I. C. C. Rep. 629.

²⁴ *Paxton Tie Co. v. Detroit S. Ry.*, 10 I. C. C. 422.

²⁵ *Rice v. Cincinnati, W. & B. R. R.*, 3 Int. Com. Rep. 841, 5 I. C. C. 193.

²⁶ *American Creosote Works v. I. C. R. R.*, 18 I. C. C. 212.

²⁷ *Alphons Custodis Chimney Construction Co. v. S. Ry.*, 16 I. C. C. 584.

²⁸ *Armour Packing Co. v. U. S.*, 209 U. S. 56, 28 Sup. Ct. 428, 52 L. ed. 681.

prosecutions against a railroad company for granting concessions, it is for the jury to determine, upon the evidence, whether a cancellation of demurrage charges by the defendant carrier was a valid settlement of a disputed claim, or was a cancellation made for the purpose of extending a concession to a favored shipper.²⁹ In one proceeding it was found that a carrier took ten millions in non-interest bearing certificates of indebtedness of a coal company; as at five per cent per annum, the interest on these certificates would be five hundred thousand dollars, it was held that this sum was in all substantial respects a rebate to the coal company, giving it to the extent that it could settle its coal bills in this way an unlawful advantage over independent dealers.³⁰ In an earlier proceeding the Commission had been lenient enough to say that, while settlements for advancement made by shippers for the construction of switch tracks may be based on shipments, repayments must not be made out of the rate, but out of available funds at the end of definite intervals.³¹

§ 632. Schemes to cover discrimination.

Discrimination would apparently result from a lease by an interstate carrier of trackage rights over a connecting line to a quarry, for the purpose of hauling with its own crew ballast for use on its line.³² The discriminatory practice of leasing elevators at unduly low rental or operating the same through subsidiary corporations has often been condemned.³³ Certainly, it is an unlawful preference to lease an elevator at nominal rental to one

²⁹ *United States v. Philadelphia & R. Ry.*, 184 Fed. 543.

³⁰ *Meeker & Co. v. Lehigh Valley R. R.*, 21 I. C. C. 129. In *United States v. Hooking Valley R. R.*, 210 Fed. 735, it was held that taking the securities of a shipper in payment of freight bills was in itself contrary to the provisions of the Act.

³¹ *Weleetak Light & Water Co.*

v. Ft. S. & W. R. R., 12 I. C. C. 503.

But see *Chesapeake & O. Ry. v. Standard Lumber Co.*, 174 Fed. 107, where an allowance of 10% off his freight bills was made a shipper who had built a tie hoist to load his ties.

³² *In re Restricted Rates*, 20 I. C. C. 426.

³³ *Omaha Grain Exchange v. A., T. & S. F. Ry.*, 28 I. C. C. 664.

competitor, by reason of the advantage in his business which he thereby acquires from the favor of the carrier.³⁴ But query whether there is anything objectionable in having land for purpose of building a tank leased by railroad to a shipper at rental said to be equal to six per cent of the value of land so leased.³⁵ Making delivery of carloads free at a certain wharf, while charging where delivery is made at other wharves, constitutes an illegal discrimination.³⁶ But it is not necessarily an unduly preferring if certain receivers of produce in carload lots are allowed to rent its facilities at terminals.³⁷ The Commission cannot permit a refund applicable to a particular shipment for the sole purpose of enabling carriers to make good a rate not in effect when the shipment moved, but which they had agreed to protect; such a practice would do away with the published tariff altogether if generally applied.³⁸ Charging lower rates to one of two manufacturers at the same point cannot be justified on the ground that there is no competition between them in the sale of their products.³⁹

§ 633. Criminal proceedings for discrimination.

A criminal charge under the Elkins Act for receiving a rebate whereby property is transported at less than the published rates involves a single continuous offense, not a series of offenses.⁴⁰ Where a shipper makes a number of shipments, and pays the full legal rate on each, and the carrier remits by various checks a portion of this rate, each remittance constitutes a separate offense.⁴¹ An in-

³⁴ *Brook-Ranch M. & E. Co. v. v. T. & P. Ry.*, 17 I. C. C. 333. *M. Pac. Ry.*, 17 I. C. C. 158.

³⁵ *Molasses Rates from Mobile*, 28 I. C. C. 666.

³⁶ *Re Wharfage Facilities at Pensacola*, 27 I. C. C. 252.

³⁷ *Wholesale Produce Dealers' Ass'n v. L. I. R. R. Co.*, 26 I. C. C. 413.

³⁸ *Crowell & Spencer Lumber Co.*

³⁹ *Union Tanning Co. v. So. Ry.*, 25 I. C. C. 112.

⁴⁰ *Armour Packing Co. v. U. S.*, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. 428.

⁴¹ *New York C. & H. R. R. v. United States*, 212 U. S. 481, 53 L. ed. 613, 29 Sup. Ct. 304.

dictment is not bad on demurrer for alleging for greater ease of proof as many payments as there were separate shipments, although the evidence may show that all the shipments were rebated for one payment by the carrier, and that, therefore, only one offense was committed.⁴² An indictment against a shipper for accepting a concession below the published rate is not bad on demurrer for failure to allege the payment by the defendant to the carrier of the alleged unlawful rate.⁴³ In an indictment for accepting and receiving a concession, proof that a shipper has agreed to accept a concession, stopping there, will not support an indictment for accepting a concession, until the intended wrong becomes an accepted fact by the actual payment of the lower rate, or by some book transaction resulting in the offsetting of mutual accounts.⁴⁴ For the rule seems to be that where an indictment charges the acceptance and receipt of money paid as a rebate, and not the acceptance of a concession, there can be no violation of the Act until it is shown that the money intended as a rebate was actually paid.⁴⁵ But an indictment which alleged the lawful rate to be so much per car, and that defendant carrier charged and received only a certain lower amount per car, sufficiently charges the giving and receiving of a "concession."⁴⁶ Likewise an indictment is sufficient which alleges the payment of the scheduled rate by the shipper to the carrier, the subsequent payment of the rebate; and it is not necessary that the indictment particularly describe the device resorted to by the carrier to accept the unlawful transportation.⁴⁷

§ 634. What intent is necessary.

Where a shipper knowingly transports goods at less

⁴² United States v. Central Vt. Ry., 157 Fed. 291.

⁴³ United States v. Vacuum Oil Co., 158 Fed. 536.

⁴⁴ Standard Oil Co. of Indiana v. United States, 164 Fed. 376, 386.

⁴⁵ United States v. Bunch, 165 Fed. 736.

⁴⁶ Atchison, T. & S. F. Ry. v. United States, 170 Fed. 250.

⁴⁷ Chicago, St. P., M. & O. Ry. v. United States, 162 Fed. 835.

than the published rate, he is liable to conviction under the Elkins Act, despite the fact that his conduct does not involve turpitude or moral wrong.⁴⁸ The corporation which profits by the transaction of rebating may be held punishable by fine, because of the knowledge and intent of its agents to whom it has intrusted authority to act in the subject-matter of making and fixing rates of transportation.⁴⁹ Rebating must be willful in order to constitute a criminal offense; and it is not sufficient to support a contention against a carrier that it knowingly granted a rate by means of an elevation allowance lower than the published rate without proof that the defendant acted in bad faith.⁵⁰ It is error to exclude evidence offered on the part of defendant to show that it had no knowledge of the lawfully published rate, especially where the tariffs setting out such rate were involved and somewhat ambiguous.⁵¹ Since to make defendant guilty, the concession granted must have been made willfully, it is error to exclude evidence offered bearing upon the intention of the defendant.⁵² To make a carrier criminally liable under the Act the omission or act complained of must be willful, so an accidental mistake is not the basis of prosecution; but willful does not mean with malice or bad purpose, but simply with knowledge.⁵³ A carrier in a criminal prosecution cannot be heard to deny that it did not know of a rate which it itself had established in accordance with the law, or urge as a justification for its departure therefrom, that it charged the lower rate at the insistent demand of the shipper.⁵⁴

⁴⁸ *Armour Packing Co. v. United States*, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. 428; see also *Chicago, B. & Q. R. R. v. United States*, 209 U. S. 90, 52 L. ed. 698, 28 Sup. Ct. 439.

⁴⁹ *N. Y. Central v. United States*, 212 U. S. 481, 53 L. ed. 613, 29 Sup. Ct. 304.

⁵⁰ *Chicago, St. P., M. & O. Ry. v. United States*, 162 Fed. 835.

⁵¹ *Standard Oil Co. of Indiana v. United States*, 164 Fed. 376.

⁵² *Atchison, T. & S. F. Ry. Co. v. United States*, 170 Fed. 250.

⁵³ *United States v. T. & P. R.*, 185 Fed. 820.

⁵⁴ *United States v. Merchants' & Miners' Transp. Co.*, 187 Fed. 363; see also *Wisconsin C. Ry. v. United States*, 169 Fed. 76.

§ 635. Civil liability for discrimination.

Discrimination can only injure a complaining shipper, if his rival has been given an unfair advantage in the same market, although different points of destination may belong to the same market.⁵⁵ The liability under section 9 of the Act for unjust discrimination, in making secret allowances to favored shippers, is not held strictly as a penalty in suits in the court for damages, but as a cause of action which survives and may be prosecuted by executors.⁵⁶ In any case where the published rate is unjustly discriminatory, the Commission has jurisdiction to order reparation to shippers injured thereby, if they can be discovered.⁵⁷ But in proceedings on behalf of the government, it would be a vain attempt in many cases to undertake to ascertain with reasonable certainty just what has resulted, and who has been injured by transactions of the kind; the lawmakers, assuming that such practice would naturally result in many instances in favoritism and irreparable wrong, have enacted the law which adjudges the practice itself to be wrong and forbids it.⁵⁸ The questions relating to commission and court proceedings, both civil and criminal, based upon the allegation and proof of discrimination or preference, are so multifarious that two chapters later on—Chapter XXIII and Chapter XXIV—are wholly devoted to the detail of these proceedings and the relief granted therein.

Topic C. Established Exceptions to Rule

§ 636. Public wrong in giving free passes.

These general principles against personal discrimination should, of course, apply to transportation of passengers as well as to transportation of goods. Dissimilarity of cir-

⁵⁵ Mitchell Coal & Coke Co. v. Co. v. C., R. I. & P. Ry. Co., 13 I. C. Penna. R. R. Co., 181 Fed. 403. C. 128.

⁵⁶ Langdon v. Penn. R. R. Co., 194 Fed. 486. ⁵⁸ Armour Car Lines v. S. P. Co., 17 I. C. C. 461.

⁵⁷ Minneapolis Threshing Machine

cumstances will justify differences in passenger rates as well as differences in freight rates, but outright discrimination between passengers asking the same service under the same conditions is as odious as personal discrimination between shippers who ask the same service. To quote the language of Commissioner Knapp in *Harvey v. Louisville and Nashville Railroad Company*:⁵⁹ "The fundamental and pervading purpose of the law is equality of treatment. It assumes that the railroads are engaged in a public service, and requires that service to be impartially rendered. It asserts the right of every citizen to use the agencies which the carrier provides on equal terms with all his fellows, and finds an invasion of that right in every unauthorized exemption from charges commonly imposed. No form of favoritism and no species of partiality seems more odious or indefensible than that which accords to personal influence or public station privileges not enjoyed by the community at large. The free carriage of certain persons merely because they occupy official positions, or have acquired some measure of distinction, offends the rudest conception of equality, and contravenes alike the policy and the provisions of the statute. The practices complained of in this proceeding are illegal, and must receive our condemnation."⁶⁰

§ 637. Passes prima facie discrimination.

It was formerly customary to give free passes very freely to the families and acquaintances of those connected with the railroad management, and also to various gentlemen whose claim for the privilege of free transportation was based upon the fact that they were long eminent in the public service, higher officers of the States, prominent officials of the United States, members of legislative rail-

⁵⁹ 5 I. C. C. Rep. 153.

⁶⁰ The object of the Act is to prevent favoritism by any means or device whatsoever and to prohibit practices which run counter to the

purpose of the Act to place all shippers upon equal terms. *Colorado Free Pass Investigation*, 26 I. C. C. 491.

road committees, and persons whose good will was claimed to be important to the railroad.⁶¹ Within the last few years the statute law and the interpretation of it based upon common-law principles has become increasingly opposed to the issue of such passes. The temper of the courts under the new régime may be judged from the following language, often cited, used in a charge to the Grand Jury⁶² by Morrow, District Judge, when he said squarely: "In other words, one of the objects of Congress in this character of legislation was to do away with the pernicious practice of unjust discriminations in rates, and to break up the odious system of favoritism and special privileges, so contrary to the principles of our government, of which one of the fundamental ideas is that all men are equal in the eyes of the law, and should be so treated. It was designed by the Act referred to, to compel common carriers of interstate commerce to discharge their public function impartially in charging for transportation; treating everybody alike, so far as that is practicable, whether in high or low station, whether public functionary or private citizen, whether rich or poor."

§ 638. Reductions for general classes.

The suggestion is made in several cases that general reductions may be made to further certain policies, provided that the public interests are thereby promoted. It is urged that such concessions, if permitted, will turn out for the best interests of all concerned in the end. The weight of this line of argument may be judged by the following abstract of part of the opinion of Judge Baxter in *Hays v. Pennsylvania Company*.⁶³ He said in effect

⁶¹ This list is largely made up from a description of the former situation in *St. Louis & S. F. Ry. Co. v. Hadley*, 168 Fed. 317. See also *State v. Martyn*, 82 Neb. 225, 117 N. W. 719, 23 L. R. A. (N. S.) 217.

⁶² 66 Fed. 146. See further *State*

v. Southern Ry. Co., 125 N. C. 666, 34 S. E. 527.

⁶³ 12 Fed. 309.

This principle was also urged in *Lough v. Outerbridge*, 143 N. Y. 271, 38 N. E. 292, 42 Am. St. Rep. 712, 25 L. R. A. 674.

that it is only when the discrimination inures to the undue advantage of one man, in consequence of some injustice inflicted on another, that the law intervenes for the protection of the latter. Harmless discrimination such as a concession to a general class might be indulged in. For instance, he said that the carrying of supplies at nominal rates to communities scourged by disease or rendered destitute by floods or other casualty would not entitle other communities to have their supplies carried at the same rate. Furthermore, it is the custom as he pointed out for railroad companies to carry fertilizers and machinery for mining and manufacturing purposes to be employed along the lines of their respective roads to develop the country and stimulate productions, as a means of insuring a permanent increase of their business at lower rates than are charged on other classes of freight; and such discrimination while it tends to advance the interest of all, worked no injustice, he thought, to anyone.⁶⁴

§ 639. Whether statutory exceptions are exclusive.

Under the old régime many classes of people got free transportation or reduced rates. So far did this go, that many decisions spoke of exceptional classes for which concessions were legally justifiable. In the original Act, there were express provisions as to certain classes of reduced rates, but the statutory list omitted many usual concessions. When this was brought to the attention of the Supreme Court, it was held⁶⁵ that the list was not ex-

⁶⁴ In *Hoover v. Penna. R. R. Co.*, 156 Pa. St. 220, 27 Atl. 282, 36 Am. St. Rep. 43, 22 L. R. A. 263, it was held in accordance with these principles that a lower rate might be made for coal brought in by factories than for coal consigned to coal yards.

But see *Hilton Lumber Co. v. Atlantic C. L. Ry.*, 136 N. C. 479, 48 S. E. 813, in which it was held that a lower in-bound rate on lumber

could not be made to a manufacturer of furniture than for lumber for local consumption.

⁶⁵ The quotation is from the opinion of Mr. Justice Brown in *Interstate Com. Comm. v. Baltimore & O. R. R.*, 145 U. S. 163, 36 L. ed. 699, 12 Sup. Ct. 844.

See *Schuyler v. Southern Pacific Co.*, 37 Utah 612, 109 Pac. 458, passes for care takers held permissible.

clusive, but indicated the sort of exceptions that could be made. In other words, this section is rather illustrative than exclusive. "Indeed," said the court, "many if not all, the excepted classes named are those which, in the absence of this section, would not necessarily be held the subjects of an unjust discrimination, if more favorable terms were extended to them than to ordinary passengers. Such, for instance, are property of the United States, State or municipal governments; destitute and homeless persons transported free of charge by charitable societies; indigent persons transported at the expense of municipal governments; inmates of soldiers' homes, and ministers of religion." To remedy this indefinite condition, one of the amendments of 1906 contains a most elaborate list of the instances where free transportation or reduced rates may be given different patrons asking substantially the same service. It is now properly held that this list is exclusive; and no other outright discriminations to excepted classes can be made. In a recent case in the Supreme Court⁶⁶ the opinion was clear now to the effect that as the legislation was specific it could not be construed away: "We think it was the intention of Congress to prevent a departure from the published rates and schedules in any manner whatsoever. If this be not so, a wide door is opened to favoritism in the carriage of property, in the instances mentioned, free of charge."

§ 640. Special forms of passenger tickets.

The provision of the Act allowing the issuance of mileage, excursion and commutation tickets, authorizes special rates to commuters, which are less per mile than the charges to other passengers for long distances; but these differences are not unjust in the eye of the law, nor are

⁶⁶ The quotation is from the opinion of Mr. Justice Day in *American Express Co. v. United States*, 212 U. S. 522, 53 L. ed. 635, 29 Sup. Ct. 315.

See *State v. Union Pacific Co.*, 87 Neb. 29, 126 N. W. 859, exchange of transportation for publicity forbidden.

places outside the commutation territory thereby subjected to undue prejudice within the purview of the Act.⁶⁷ A party-rate ticket, it was said in the *Baltimore & Ohio* case discussed in the previous section, is not a "mileage" or "excursion" ticket, within the provisions of this section; nor does it seem to be included in the phrase "commutation ticket;" but it was held that special party-rate tickets, being of this general class, might be sold at a lower rate of fare, though not enumerated in section 22.⁶⁸ It would seem that, under the amendments of 1906, this interpretation must remain unchanged, so far as the carriage of goods under dissimilar circumstances or the issuance of special forms of tickets are concerned; but the enumeration of persons to whom free passes may be issued is so exhaustive and so carefully made that it is to be held exclusive, as the second case discussed in the previous section held. All forms of tickets, issued under the saving of this clause, must, however, be sold for a reasonable rate for the particular service and without discrimination to all applicants.⁶⁹ Carrying baggage free for such passengers as present it for transportation along with them, it may be noted, is held no discrimination against passengers traveling without baggage.⁷⁰ But no opinion was expressed upon the lawfulness of a carrier's practice of transporting packages of a certain kind free for commuters or passengers.⁷¹

§ 641. Concessions for government business.

It is generally said that special reductions or even free service may be given a government, of whatever grade it may be, without its being considered undue preference or

⁶⁷ *Sprigg v. B. & O. R. R.*, 8 Int. Com. Rep. 443.

⁶⁸ See notes 63 and 64, *supra*; see also *Larrison v. Chicago & G. T. Ry.*, 1 Int. Com. Rep. 369, 1 I. C. C. 147; *Troy Board of Trade v. Alabama M. Ry.*, 6 I. C. C. Rep. 1.

⁶⁹ *Freight Bureau v. Cincinnati, N. O. & T. P. Ry.*, 6 I. C. C. Rep. 195.

⁷⁰ *Herbeck Demer Co. v. B. & O. R. R.*, 17 I. C. C. 85.

⁷¹ *Walker v. B. & O. R. R. Co.*, 12 I. C. C. 196.

illegal discrimination. Thus the Supreme Court of the United States has squarely said ⁷² that as a common-law matter, regardless of whether the exception was specifically made in the legislation, the property of United States, State, county or municipal governments might be transported on more favorable terms than for other parties without its being illegal discrimination. In view of the special provisions of the Act applicable thereto, there can be no doubt that troops and property of the government may be carried at special rates, which need not even be posted or filed.⁷³ The transportation of fish and eggs, distributed by the United States Commission of Fish and Fisheries, has been held within the exception of section 22 of the Act.⁷⁴ Under this exception the Commission has ruled that a carrier may make special rates with individuals to enable the latter to make proposals to the Interior Department for transportation of Indian supplies, such transportation being for the United States.⁷⁵ It is, however, improper to permit the benefit of the government rate to accrue to anyone other than government; thus contractors on public work are not governments, and cannot be given special rates.⁷⁶

§ 642. Reduction for charitable purposes.

The argument has been made in several cases, most of them early cases, that it could not be contrary to law for the carrier to make occasional concessions in particular cases, as no harm of any considerable sort would be done to others by the granting of such special favors. The example usually given of such occasional favors is that the railroad might carry for charity in particular instances. If this be so, it must according to modern ideas be subject

⁷² *Interstate Commerce Commission v. Baltimore & O. R. R. Co.*, 145 U. S. 163, 36 L. ed. 699, 12 Sup. Ct. 844.

⁷³ *United States v. So. P. Co.*, 25 I. C. C. 255.

⁷⁴ *Re Indian Supplies*, 1 Int. Com. Rep. 22, 1 I. C. C. 15.

⁷⁵ *Havens & Co. v. C. & N. W. Ry. Co.*, 20 I. C. C. 156.

⁷⁶ *Metropolitan Paving Brick Co. v. Ann Arbor R. R.*, 17 I. C. C. 197.

to the most strict limitations; and if this exception remains in modern common law it can only be with the qualification expressed by Chief Justice Doe in one of his great cases,⁷⁷ "This question may be made unnecessarily difficult by an indefiniteness, confusion, and obscurity of ideas that may arise when the public duty of a common carrier, and the correlative common right to his reasonable service for a reasonable price, are not clearly and broadly distinguished from a matter of private charity. If A receives, as charity, transportation service without price, or for less than a reasonable price, from B, who is a common carrier, A does not receive it as a performance of his public duty; C, who is required to pay a reasonable price for a reasonable service, is not injured; and the public, supplied with reasonable facilities and accommodations on reasonable terms, cannot complain that B is violating his public duty. There is, in such a case, no discrimination, reasonable or unreasonable, in that reasonable service for a reasonable price which is the common right. A person who is a common carrier may devote to the needy, in any necessary form of relief, all the reasonable profits of his business. He has the same right that anyone else has to give money or goods or transportation to the poor. But it is neither his legal duty to be charitable at his own expense, nor his legal right to be charitable at the expense of those whose servant he is."⁷⁸

§ 643. Transportation for the carrier itself.

A carrier can, of course, lawfully transport, without making charges to itself therefor, materials and supplies

⁷⁷ *McDuffee v. Portland & R. R.*, 52 N. H. 430, 13 Am. Rep. 72.

⁷⁸ Rates may be reduced for religious teachers as an act of charity, and missionaries are included in the exception. *Re Religious Teachers*, 1 Int. Com. Rep. 21. Application

must be made for a pass to the proper authority, or the minister will not be entitled to the reduction. *Emerson v. Chicago, R. I. & P. Ry.*, 6 I. C. C. Rep. 289. Charitable institutions and clergymen defined: *Re Passes for Charitable Institutions*, 15 I. C. C. 45.

for its own use in its proper business.⁷⁹ But a carrier may not lawfully transport free, or at a reduced rate, materials for building or repairs on a refrigeration plant built under contract with carrier, but which also engages in commercial ice business.⁸⁰ Contractors engaged in working upon railroad property may properly be supplied with the transportation necessary for carrying on the job at reduced rates or without charges.⁸¹ So it may be provided in contracts with other companies, where the railroad participates in the use, that men and materials may be transported without charges for construction and repairs.⁸² It has always been permitted that a company may properly pass its own employees and officers, its agents, surgeons, physicians, and attorneys at law, unless their employment is nominal.⁸³ But it can now pass their families only in so far as the Act provides; although it should be said that as the phrasing relating to this matter now reads there are some ambiguities.⁸⁴

§ 644. Sale and delivery of commodities.

Where a railroad buys or produces commodities and then sells them and delivers them to the buyer at a price which really nets the road for its transportation charges less than the scheduled rates the Supreme Court has held that the transaction involves an illegal rebate.⁸⁵ The purpose of the statute, said the court in that case, was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about. If the public purpose which the statute was intended to accomplish be borne in mind, its meaning

⁷⁹ *In re Transportation of Company Material*, 22 I. C. C. 439.

⁸⁰ *In re Restricted Rates*, 20 I. C. C. R. 426.

⁸¹ *Grant Bros. Co. v. Atchison, T. & S. F. Ry.*, 13 Ariz. 186, 108 Pac. 467.

⁸² *Re Railroad-Telegraph Contracts*, 12 I. C. C. 10.

⁸³ *Colorado Free Pass Investigation*, 26 I. C. C. 491.

⁸⁴ *Ex parte Koehler*, 31 Fed. 315, 1 Int. Com. Rep. 317.

⁸⁵ *New York, N. H. & H. R. R. v. Interstate Commerce Commission*, 200 U. S. 361, 26 Sup. Ct. 272.

becomes, if possible, clearer. What was that purpose? It was to compel the carrier, as a public agent, to give equal treatment to all. Now if, by the mere fact of purchasing and selling merchandise to be transported, a carrier is endowed with the power of disregarding the published rate, it becomes apparent that the carrier possesses the right to treat the owners of like commodities by entirely different rules. Consequently it was held in the early days of the Commission that a railroad company violated the Act by developing a system for buying and transporting grain.⁸⁶ It was held by the Commission, to be sure, in another case⁸⁷ that the two railroads in the question might legally mine and sell coal, because they had possessed for a long time before the passage of the Act the legal power to do so; and the Commission could only enforce the requirement that their rates for carriage should be reasonable. Since the policy against transporting its own commodities in commerce has been denounced, the Commission has been very sweeping in its generalizations against such arrangements, saying that so long as there is identity of ownership in the agency of transportation and the thing transported it is difficult, if not impossible, to prevent discrimination.⁸⁸

§ 645. Policy of the commodities clause.

By the Hepburn Act of 1906, it was provided that, after May 1, 1908, it should be illegal for a carrier to transport property owned by it. In litigation brought to test validity of this commodities clause, as it is called, the Supreme Court⁸⁹ held that, although the legislation

⁸⁶ *Re Alleged Unlawful Rates*, 7 I. C. C. Rep. 33; see also *Re Transportation of Coal*, 10 I. C. C. 473.

⁸⁷ *Haddock v. D., L. & W. Ry.*, 3 Int. Com. Rep. 302, 4 I. C. C. 296; see also *Cox v. L. V. R. R.*, 3 Int. Com. Rep. 460, 4 I. C. C. 435.

⁸⁸ *Cedar Hill C. & C. Co. v. A., T. & S. F. Ry.*, 15 I. C. C. 73.

⁸⁹ *United States v. Delaware & H. R. R.*, 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. 527. In *D., L. & W. Ry. v. United States*, 231 U. S. 363, 34 Sup. Ct. 55, the commodities clause was held applicable to the transportation of hay brought by a railroad for use in mines which it owned.

was constitutional, it did not apply to the facts of the case before it, which are in fact more often found, where the railroad company did not own the coal itself, but owned the controlling interest in the stock of large coal companies shipping over it. However, the Supreme Court⁹⁰ has very recently held that, while under the commodities clause of the Hepburn Act the right of a railroad company as a stockholder in a coal company to use its stock ownership for the purpose of a bona fide separate administration of the affairs of the coal corporation may not be denied, the use of such stock ownership for the purpose of destroying the entity of the producing corporation, and of commingling its affairs in administration with the affairs of the railroad company, so as to make the two corporations virtually one, brings the railroad company within the prohibition of the commodities clause. While the Commission has not been charged with the enforcement of the clause, it must necessarily take cognizance of any violation thereof whereby a wrong is done by a railroad carrying its own coal to other shippers over its lines who are under the protection of the Act.⁹¹ In the latest case before the Commission involving the clause it was held the ownership of a railroad by the principal shipper over it was not forbidden by the Act; and at all events such a railroad should not be subjected to discrimination by other carriers even if it were violating the clause.⁹²

§ 646. Carriage for other companies.

Where the stock in one railway company is owned by another railway company, but both maintain separate

⁹⁰ *United States v. Lehigh V. R. R.*, 220 U. S. 257, 55 L. ed. 458, 31 Sup. Ct. 387. In *United States v. Delaware, L. & W. Ry.*, 213 Fed. 240, it was held that a contract between a railroad company and a coal company by which the latter agreed to purchase coal mined by the former did

not work a violation of the clause by reason of the subsequent transportation of such coal.

⁹¹ *Consolidated Fuel Co. v. A., T. & S. F. Ry.*, 27 I. C. C. 554.

⁹² *Campbell's Creek Coal Co. v. A. A. R. R.*, 29 I. C. C. 682.

organizations and report separately to Commission, they may not carry freight free for each other.⁹³ The local rate to a junction point should be same for all shippers to that point, and the through charge on shipments going beyond junction should be alike for all shippers to same destination; therefore, where coal is consigned to a point on railroad B from a point on railroad A, the regular rate from point to point should be paid, although this is coal to be used as fuel by the road.⁹⁴ A railroad company or system cannot lawfully contract, in consideration of free telegraph service or service at reduced rates over wires beyond its own right of way, to furnish free or reduced-rate transportation in connection with the construction, maintenance, or operation of a telegraph line and service off the line of such company or system and upon the line or lines of another carrier or system.⁹⁵ A carrier as a shipper may not have any preference in the application of transportation conditions or in the matter of tariff charges; and conversely a carrier shipping over the lines of another is entitled to the same treatment as any other shipper.⁹⁶

§ 647. No obligation to grant such concessions.

It should be noted, however, here as throughout this whole discussion, that there is no common-law obligation resting upon the company to give concessions of any kind from the rates others pay for the same service. This makes one doubtful of the legal character of these exceptions as an abstract matter of common law; for were there imperative reasons dictating such exceptions, a company could not refuse to make them in any case. And, indeed,

⁹³ *In re Restricted Rates*, 20 I. C. C. 426.

⁹⁴ *Interstate Commerce Commission v. Baltimore & O. R. R.*, 225 U. S. 326, 56 L. ed. 1107, 32 Sup. Ct. 742.

⁹⁵ *Re Railroad Telegraph Contracts*, 12 I. C. C. 10. See also *Re*

Right of Railroad Companies to Exchange Transportation, 12 I. C. C. 39.

⁹⁶ *Re Transportation of Company Material*, 22 I. C. C. 439; see also *Hutchison C. & C. Co. v. B. & O. R. R.*, 16 I. C. C. 512.

it is significant that it is well agreed that the company need not make any such concessions. It may even refuse to the United States government a party-rate ticket for soldiers which it usually sells to other managers of travelers in groups, as one extreme case holds.⁹⁷ Moreover, it may discriminate in granting its favors, which is proof positive that this is no part of its legal obligation. Thus a particular minister of the gospel whom a carrier refused to carry for the customary reduced fare charged such persons has no right of action against the carrier because of the discrimination.⁹⁸ The most that these exceptions amount to, therefore, is that there is a sufficient public policy in them to justify the legislation extending these special favors.

§ 648. Collateral results of illegal discrimination.

Any contract entered into for the performance of anything to be done in violation of the Act is, of course, unenforceable in the courts. Thus where a special service was contracted for, which was not covered by the rate as scheduled, it was recently held by the Supreme Court that no action could be brought for breach of the contract to forward in the way promised.⁹⁹ So where a contract with the carrier provides for refund to the shipper of a portion of a published interstate rate, it was held by a state court that such a contract cannot be enforced, even though the shipper may not have known that he was violating the law.¹ The extent to which such illegality taints collateral

⁹⁷ *United States v. Chicago & N. W. R. R. Co.*, 127 Fed. 785.

In so far as the laws administered by this Commission are concerned, the right of carriers to transport government property free or at reduced rates is elective and not mandatory. *United States v. U. P. R. R. Co.*, 28 I. C. C. 518.

⁹⁸ *Illinois C. R. Co. v. Dunnigan* (Miss.), 50 So. 443, 24 L. R. A. (N. S.) 503.

Refusal to return free property exhibited at National Dairy Show Asso. in Chicago, while returning free property exhibited at State fairs and expositions at Syracuse and Trenton not found unduly discriminatory. *Dairymen's Supply Co. v. P. R. R. Co.*, 28 I. C. C. 406.

⁹⁹ *Chicago & A. R. R. v. Kirby*, 225 U. S. 155, 56 L. ed. 1033, 32 Sup. Ct. 648.

¹ *Louisville & N. R. R. Co. v.*

transactions so as to bar the plaintiff from recovery is a question on the authorities. Where a shipper has himself enjoyed an unlawful rate, he cannot naturally recover for unjust discrimination against a carrier for giving a competitor on like shipment a lower rate still.² And it would be agreed that a shipper declaring false value to secure a reduced rate is estopped, in case of loss or damage, from denying correctness of value given.³ It has been held the fact that a rate given to a shipper violates the provisions of the Act in regard to adherence to schedules filed with the Commission does not preclude the shippers from recovering for goods destroyed by carrier.⁴ And one who travels on a free pass, given in violation of this section, according to some authorities, may recover damages for injuries due to negligence of the railroad company; thus⁵ a railway clerk riding on a pass while off duty has been allowed to recover for injuries.⁶ On the other hand, in at least one case a man riding on a pass given and taken in violation of law has been refused recovery.⁷ And it has been held that where a railroad carries for a customer at less than the scheduled rates, wrongfully intending to give him a rebate therefrom, being in *pari delicto* it cannot recover the unpaid part of the scheduled rate.⁸ The effect of a violation of the Interstate Commerce Act is to make the contract of carriage including the rate named therein, invalid; the carrier therefore cannot be sued for breach of an executory term of the contract.⁹ No suit, therefore, can be brought by a shipper against a railroad for breach

Coquillard Wagon Wks., 147 Ky. 530, 144 S. W. 1080.

² Pennsylvania R. R. Co. v. International Coal Mining Co., 173 Fed. 1.

³ In re Express Rates, 28 I. C. C. 132.

⁴ Central of Ga. Ry. v. Butler M. & G. Co., 8 Ga. App. 1, 68 S. E. 775.

⁵ Merchants' C. P. & S. Co. v.

Insurance Co. of N. A., 151 U. S. 368, 38 L. ed. 195, 14 Sup. Ct. 367.

⁶ Schuyler v. Southern Pacific Co., 37 Utah, 581, 109 Pac. 458.

⁷ McNeill v. Durham & C. R. R. Co., 132 N. C. 510, 44 S. E. 34.

⁸ Interstate Commerce Commission v. Chesapeake & O. Ry. Co., 128 Fed. 59.

⁹ Illinois Central R. R. Co. v. Seits, 214 Ill. 350, 73 N. E. 585.

of contract to furnish transportation at less than scheduled rates in return for building a siding and providing exclusive shipments.¹⁰

Topic D. Other Considerations for Reductions

§ 649. Other consideration formerly considered dissimilar circumstance.

Abstractly it is not discrimination if one shipper pays his freight rate in money and another pays the same rate, partly in money and partly in services. This has been permitted in several cases, for example in *Rothschild v. Wabash Railroad*¹¹ where a certain reduction was allowed to certain shippers who acted as "eveners" in distributing the traffic to several railways. In permitting these facts to be shown in justification to a suit based upon this alleged discrimination, Judge Lewis said: "Suppose a railway company, instead of paying its conductor a salary, should choose to compensate his services by a percentage of the receipts from passengers traveling on his train. Suppose the conductor to purchase tickets at regular rates, for the use of members of his family, as passengers, on his train. He claims and receives his percentage on such tickets, as upon all others. Would it not be strangely absurd to allege that, by reason of this percentage, there is an unjust discrimination in the conductor's favor, reducing the cost of transportation to him, below what others are compelled to pay for the same facilities? The principle involved would be exactly the same that appears in the present case. Neither reason nor precedent find any injustice or unfairness in either application of it. It is sometimes a matter of judicial inquiry, whether the consideration rendered by the shipper is fairly adequate and not comparatively valueless, except as a mere device to cover up the intended favoritism of the company. But no such question is raised in the present case. For aught

¹⁰ *Taezer v. Chicago, R. I. & P.*,
191 Fed. 543.

¹¹ 15 Mo. App. 242, affirmed in 92
Mo. 91, 4 S. W. 418.

that appears, the undertaking and services of the 'eveners' were a fair equivalent for the percentage paid them."¹²

§ 650. Whether indefinite considerations can be a basis.

It may be conceded that it does not make any difference in what way the freight rate is paid, so that it appears plainly that the full rate is paid; but if some indefinite consideration on which no estimate can accurately be made to ascertain the amount of the charge is alleged, it will be dangerous to permit that to pass. Thus in the important case of *Goodridge v. Union Pacific Railway Company*,¹³ the complainant demanded a refund of overcharges by reason of discrimination against him by giving a lower rate to the Marshall Coal Mining Company. The defendant railroad as part of its defense brought out that it was formerly liable to the Marshall Company to a suit for damages for an alleged trespass and to settle this suit it

¹² Considerations inuring to the benefit of the carrier before the statutes of the type now prevailing were permitted to be shown by most courts. *Union Pac. Ry. Co. v. Goodridge*, 149 U. S. 680, 37 L. ed. 986, 13 Sup. Ct. 970; *Louisville & N. R. R. v. Fulgnam*, 91 Ala. 555, 8 So. 803; *Johnson v. Pensacola & P. R. R.*, 16 Fla. 623, 26 Am. Rep. 731; *Chicago & A. R. R. v. Coal Co.*, 79 Ill. 121; *Rothschild v. Wabash, St. L. & P. R. R.*, 92 Mo. 91, 4 S. W. 418; *Hoover v. Pennsylvania R. R.*, 156 Pa. St. 220, 27 Atl. 282, 36 Am. St. Rep. 43, 22 L. R. A. 263.

But some courts even at common law regarded it as dangerous to allow this to be done. *Louisville, E. & St. L. Con. R. Co. v. Wilson*, 132 Ind. 517, 32 N. E. 311, 18 L. R. A. 105 and note; *Griffin v. Goldsboro Water Co.*, 122 N. C. 206, 30 S. E. 319, 41 L. R. A. 240; *Brundred v. Rice*, 49 Ohio St. 640, 32 N. E. 169, 34 Am. St. Rep. 589; *Fitzgerald v.*

Grand Trunk Ry., 63 Vt. 169, 22 Atl. 76, 13 L. R. A. 70.

¹³ 37 Fed. 182, affirmed in 149 U. S. 680, 37 L. ed. 986, 13 Sup. Ct. 970.

The distinction made in the principal case above will reconcile two federal cases of recent instance. In one it was held that when a liquidated sum is owed a shipper by a carrier, the carrier can pay it off at regular rates. *Interstate Comm. Comm. v. Chesapeake & O. R.*, 128 Fed. 59.

In the other it was held to be no defense in a prosecution of a railroad company for granting concessions to a shipper from its published rates, in violation of the Elkins Act, that such concessions were granted in compromise of unliquidated claims against the company for loss of property in transit. *United States v. Atchison, T. & S. F. Ry.*, 163 Fed. 11.

entered into this contract for giving this company these lower rates. But Judge Hallet said that to allow this would endanger the law forbidding discrimination. "This law cannot be controlled or defeated by any agreement between the railroad company and the favored shipper. It is true that when the consideration paid for reduced rates by the favored shipper is obviously equal to the discount allowed him, the law does not apply. Whenever that fact appears, since it matters not in what form the shipper pays the usual rates, the alleged discrimination disappears, and the contract is no longer obnoxious to the law. If, to illustrate, the damages due from the Denver & Western Company had been liquidated, and the agreement was to carry a certain quantity of coal for the amount so fixed, the question would be different. As it stands, the agreement is to give to the Marshall Company a reduced rate for certain considerations which defendant says are sufficient to make up the discount from the schedule rate; and as to that matter, the fact cannot be ascertained from the contract or otherwise."¹⁴

§ 651. Concessions to those who deal with the carrier.

The dangers inherent in any permission to the common carrier to make different rates to different classes of customers requiring the same service is most apparent in a case like *Louisville, Evansville & St. Louis Consolidated Railroad Company v. Wilson*.¹⁵ In that case it appeared

¹⁴ Free transportation issued in the form of an annual pass to a person not in the regular and stated service of the carrier now receiving any wages or salary under a contract of employment, but requested by him as compensation for throwing in its way what business he conveniently could, held to be illegal in *Slater v. Northern P. R. R.*, 2 Int. Com. Rep. 243, 2 I. C. C. Rep. 359.

A release of liability by commercial travelers to the railroad company does not constitute a good and sufficient consideration for discrimination in fare; nor does the fact that they may influence business in favor of the road. *Lamson v. Grand Trunk Ry.*, 1 Int. Com. Rep. 369, 1 I. C. C. Rep. 147.

¹⁵ 132 Ind. 517, 32 N. E. 311; *American T. & T. Co. v. K. C. So. Ry.*, 175 Fed. 28, *accord*.

that the railroad made high rates on cross-ties to all except one Dickason, with whom it entered into a contract giving him low rates in return for his agreement to sell it such ties as it should wish at a specified price. When this scheme was brought before the court for examination in a suit by a shipper who had suffered by this discrimination, it appeared that while he was paying \$24 per car from one point to another, this Dickason was paying only \$14 per car for the same transportation. The highest court sustained the instructions given in behalf of the plaintiff. A part of its opinion follows: "Instruction No. 3, asked by the appellant, and refused by the court, was vicious, in that it was calculated to create the impression upon the minds of the jury that the contract between the appellant and Dickason did not amount to an unjust discrimination, if it was based upon an adequate consideration. If the contract was of such a character as to destroy the business of the appellees by reason of the discrimination in favor of Dickason, and thus enable Dickason to acquire a monopoly of the business of purchasing and shipping cross-ties on appellant's road, the discrimination was unjust, without regard to the consideration upon which it was based." ¹⁶

§ 652. Fostering the interests of the carrier.

Despite any policy which the carrier may have in mind, it must be evident that all patrons of the road have a right to adequate service at fair rates. Every producer has a right to sell his product as he pleases in the best market available, and rates must not be adopted with the idea of compelling the product to be disposed of in a way desired by the carrier. In one extreme case of this sort the railroad company refused to furnish cars for a coal miner who would not sell his coal to a coal company

¹⁶ On similar facts, see *Reynolds v. Western N. Y. & Pa. R. R.*, 1 Int. Com. Rep. 685, 1 I. C. C. Rep. 393. See, also, *The Cedar Lumber Products Case*, 3 Can. Ry. Cas. 412, to the same effect.

which was allied with the railroad.¹⁷ In one of the earliest cases before it, the Commission left the question open whether free passes could be given proprietors of hotels, agents of ice companies, milk contractors, trustees of railroad mortgages and newspaper publishers for advertising. But in a case a few years later, the Commission held that the free transportation of shippers or dealers between State or interstate points on account of interstate freight traffic furnished to the carrier is unlawful.¹⁸

§ 653. Barter of transportation now forbidden.

Recent decisions of the courts make it clear that, as the Act is now interpreted, the barter of transportation is forbidden. In a recent case in the Supreme Court it was held that a carrier which had agreed to furnish transportation to a publisher and his employees in exchange for advertising space, at the regular advertising rate of the publisher, violated the provisions of the Act forbidding the furnishing of transportation at rates less than and different from those exacted from the general public.¹⁹ Nor can a railroad balance off passenger transportation against general publicity, according to the ideas now prevalent; as was said recently in a State court, the purchase of a ticket by a passenger and its sale by the company shall be consummated only by the former paying cash and by the latter receiving cash of the amount specified in the

¹⁷ The citations for these two cases are *Paxton Tie Co. v. Detroit S. R. R.*, 10 I. C. C. Rep. 422, and *Lorraine v. Pittsburg, J. E. & E. R. R.*, 205 Pa. St. 132, 54 Atl. 580, 61 L. R. A. 502.

A pass issued for valuable considerations held was formerly not discrimination. See *Curry v. Kansas & C. P. Ry.*, 58 Kans. 6, 48 Pac. 579, and cases cited; *State v. Southern Ry.*, 125 N. C. 666, 34 S. E. 527, and cases cited.

¹⁸ The citations for these two cases

are *Re Boston & M. R. R.*, 3 Int. Com. Rep. 717, and *Milk Producers' Ass'n v. D., L. & W. Ry.*, 7 I. C. C. Rep. 92.

Other cases of the older time permitting the barter of transportation are *Grimes v. Minneapolis, L. & M. Ry.*, 37 Minn. 66, 33 N. W. 34, and *Erie & P. Ry. v. Douthet*, 88 Pa. St. 245, 32 Am. Rep. 45.

¹⁹ *Chi., Ind. & L. Ry. Co. v. United States*, 219 U. S. 486, 31 Sup. Ct. 272, 55 L. ed. 305.

published tariffs.²⁰ In one of the federal cases it was decided that under section 2 of the Act, forbidding a carrier to discriminate between shippers in compensation for transportation under substantially similar circumstances and conditions, a carrier may not grant to one shipper a lower rate by reason of the fact that he contracted to sell coal, while lower rates were in effect, while the complaining shipper in the same district is not so obligated, since the circumstances and conditions intended do not include individual elements affecting individual shippers.²¹ And in one of the very latest cases on this point it was held where the defendant railroad in a certain coal district was accustomed to collect at the end of the month for shipments of coal made during the month, but in pursuance of a previous arrangement accepted promissory notes from one shipper in part payment of the freight charges for the month on shipments sent as prepaid, while at the same time exacting cash payment from other competing shippers in the same district, and the notes given by the favored coal company were later merged into bonds of that company, that all this being shown the defendant was criminally liable under the Act, for a willful failure to observe its tariffs, on the ground of both accepting a less or different compensation and of extending privileges or facilities not specified in its tariffs.²²

§ 654. Inconsistent contracts held unavailing.

The provisions of the Act, making it illegal for shippers to receive rebates, are to be read into contracts for rates, made between shippers and carriers, and become a part of such contracts; and, therefore, by the doctrine of the courts, a shipper who has a special contract runs the risk of a change in rate, and if the new rate is higher he must pay

²⁰ *State v. Union Pac. Ry.*, 87 Mo. 29, 126 N. W. 859.

²¹ *Pennsylvania R. R. Co. v. In-*

ternational Coal Mining Co., 173 Fed. 1.

²² *United States v. Hocking Valley Ry.*, 194 Fed. 234, *s. c.*, 210 Fed. 735.

it.²³ A railroad, which has duly published an advance in rates, may charge a shipper the advanced rate, despite a private agreement with him to carry goods at the rate in existence prior to the advance.²⁴ The Commission has frequently held that contracts of parties, even if valid at the time, cannot justify an unjust discrimination, when conditions change.²⁵ Rate making cannot be governed by private agreements respecting rates or schedules of rates, or by estoppel.²⁶ A contract based on a lower rate existing before an advance is no ground alone for condemning such advance.²⁷ Though the defendant had by its contract with another road reserved the right to cancel joint through rates, the carrier was ordered to maintain such rates where their cancellation would result in unreasonable charges.²⁸ The terms of any contract to "continue a fair basis" of rates must always give way to the lawful, reasonable and non-discriminatory rate.²⁹ And generally speaking any change in the law invalidates contracts for special transportation.³⁰

§ 655. Continuing contracts no justification.

A troublesome problem arises, it will have been seen, when the continuing to render service at certain rates fixed by a contract, which was legal when it was made, comes into conflict with new rates later scheduled, by which the public generally are called upon to pay higher rates.³¹ It once seems to have been thought that a continuing contract to take shipments must be respected

²³ *In re Advances on Vehicles*, 22 I. C. C. 124.

²⁴ *Rhineland Paper Co. v. Mo. Pac. Ry.*, 13 I. C. C. 633.

²⁵ *Baltimore Butchers Livestock Co. v. P. B. & W. R. R.*, 20 I. C. C. 124.

²⁶ *Michigan Upper Peninsula Pig-iron Rates*, 26 I. C. C. 234.

²⁷ *American Creosote Works v. I. C. R. R.*, 18 I. C. C. 212.

²⁸ *In re Investigation & Suspension Docket 28*, 21 I. C. C. 455.

²⁹ *Sinclair & Co. v. C., M. & St. P. Ry.*, 21 I. C. C. R. 490.

³⁰ *Re Contracts of Express Companies*, 16 I. C. C. 246.

³¹ *Chicago & A. R. R. Co. v. Chicago V. & W. Coal Co.*, 79 Ill. 121; and compare *Southern Wire Co. v. St. Louis, B. & T. R. R.* 38 Mo. App. 191.

when rates generally are raised; but of late with the stringent law against all discrimination and the insistent enforcement of it, even a definite contract, still continuing by its terms, is held no justification for giving to the particular customer lower rates than those called for from all by the present schedule.²² Once the policy against discrimination is well established, there is no difficulty in saying that, for reasons of public policy, no further obligation attaches to such a contract. To the argument that the contract may have been valid when made if it fixed the rate then charged to all, and that, therefore, the subsequent action of the railroad in advancing rates generally could not invalidate it, the United States Supreme Court²³ replied recently: "This contention loses sight of the central and controlling purpose of the law, which is to require all shippers to be treated alike, and that the filed and published rate, shall be equally known by and available to every shipper." Under its new powers the Commission has recently held that discrimination resulted from demanding higher charges from new than from old subscribers for same telephone service and facilities.²⁴

§ 656. Whether executed contracts are different.

Where the full consideration for subsequent transportation has been paid in advance, the continued execution of this contract might not have seemed to be discrimination against those who are paying as they go the rates scheduled later. But it was held in *Louisville & Nashville Railroad v. Mottley*,²⁵ that a contract by a railroad, upon consideration of a past release, that the

²² *Fitzgerald v. Grand Trunk Ry.*, 63 Vt. 169, 22 Atl. 76, 13 L. R. A. 70; but see *Laurel Mills v. Railroad Co.*, 84 Miss. 339, 37 So. 134.

²³ *Armour Packing Co. v. United States*, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. 428.

²⁴ *Shoemaker v. C. & P. Tel. Co.*, 20 I. C. C. 614.

²⁵ 219 U. S. 467, 35 L. ed. 297, 31 Sup. Ct. 265.

But see *Curry v. Kansas & Col. Pacific R. R. Co.*, 58 Kans. 6, 48 Pac. 583.

And see *Hurley v. Big Sandy & C. Ry. Co. (Ky.)*, 125 S. W. 302.

releasers should travel without charge for the remainder of their lives was not to be supported, after the stringent provisions of the Act against transportation at varying rates had been enacted. The Supreme Court held that the Act is not unconstitutional as infringing the right of contract, or as taking property for public use without just compensation, or due process of law, by reason of the fact that it invalidates a contract entered into prior to its passage, between a person and a railroad, by which the latter, in consideration of the release of a cause of action for personal injuries, granted to such person and his family free transportation for life. In a more recent case, *Fourche River Lumber Company v. Bryant Lumber Company*,³⁶ a differential allowed in arrangement for the purchase of a right of way was held to taint the whole transaction, although the consideration was apparently much less than the value of the land conveyed. And the Supreme Court insisted once more that the Act so forbade the making of any concessions that any departure by one from the payment of the rates scheduled for all would be held to be altogether illegal.

§ 657. Preference in certain services permissible.

In matters outside the scope of its public business the carrier is at liberty to discriminate at pleasure; for such cases are not covered by the Act. In providing cars for its traffic it may lease as well as buy them, and if it leases them, it may deal exclusively with one car company, and refuse to deal with other companies.³⁷ So a railway company practices no discrimination within the Act by selling

³⁶ 235 U. S. 316, 57 L. ed. 1498, 33 Sup. Ct. 887.

It follows, of course, that the railroad is not justified in issuing passes on any contract old or new upon such consideration past or present. *Gill v. Erie Ry.*, 135 N. Y. Supp. 355.

And a recent case goes the length

of holding that the former owner of the land in such a case cannot recover back land given for free passes or demand passes. *Cowley v. Northern Pacific Ry.* (Wash.), 123 Pac. 998.

³⁷ *Re Burton Stock-Car Co. v. Chicago, B. & Q. R. R.*, 1 Int. Com. Rep. 329, 1 I. C. C. 132.

passenger tickets at full fare to a land company which sells them at half rates to guests of its hotel, persons residing upon land sold or transferred by it, and others, but refusing to sell them at half rates to a person living in the same locality upon ground not acquired from it.³⁸ So a railroad may make and carry out an exclusive contract with a stockyards company for the exclusive delivery to that company of live stock in a city, and no other stockyards company or carrier can complain so long as all shippers and consignees have equal facilities there.³⁹ And this is true although in carrying out such contract it refuses to deliver to another railroad company, for delivery to a competing stockyards, live stock consigned to such competing stockyards.⁴⁰ In a recent proceeding the Commission declined to require a carrier to furnish petitioner the same facilities for conducting an auction business at its terminals as it accorded exclusively to a rival concern.⁴¹ And it has held that section 15 in regard to allowances is not applicable where an allowance is made to a compress company, not the owner of the cotton.⁴²

§ 658. What favors constitute discrimination.

It has frequently been held that it is not undue prejudice to demand prepayment of freight of a consignee, although others do not need to prepay; for it was said that even a bad motive for lawful act does not render carrier liable.⁴³ But this has recently been considerably modified by holding forbidden by the Act a device of extending credit to such a shipper for the freight charges on his shipments by acceptance of corporate securities in

³⁸ *Willson v. Rock Creek R. R.*, 7 I. C. C. Rep. 83.

³⁹ *Central Stockyards Co. v. Louisville & N. R. R.*, 118 Fed. 113, 55 C. C. A. 63.

⁴⁰ *Railroad Commission of Kentucky v. Louisville & N. R. R.*, 10 I. C. C. Rep. 173.

⁴¹ *Southwestern Produce Distrib-*

utors v. W. R. R., 20 I. C. C. 458.

⁴² *Merchants Cotton Press & Storage Co. v. I. C. R. R.*, 17 I. C. C. 98.

⁴³ Compare *Gamble-Robinson Commission Co. v. Chicago & N. W. Ry.*, 168 Fed. 161, the first case stated, with *United States v. Hocking Valley Ry.*, 210 Fed. 738, the second case discussed.

settlement of freight bills, while exacting and collecting cash for substantially similar shipments from the other shippers.⁴⁴ It has been held that, as it is a carrier's right to demand prepayment on all shipments, it may not distinguish between persons who pay in advance and those who do not. And it follows that where a new tariff requiring prepayment of charges has become effective prior to a shipment, the carrier is not bound to reconsign without prepayment of charges a car belonging to a shipper to whom it has been accustomed to extend credit. So the exercise by a railway company of the right to prepayment, or to retain a lien upon the goods until payment is made, or to hold the consignee responsible in case of delivery before payment, or the waiver of some of such rights at different times, cannot be construed to be a discrimination.⁴⁵

§ 659. Where service of different character.

The duty of a carrier under the Act, to refrain from giving preference or advantages to one shipper over another, is applicable only where the same or similar conditions are prevalent.⁴⁶ The use in Section 1 of the Elkins Act of the word "discrimination," with the qualifying and adjective "unjust" was not intended to broaden the prohibitions of the original Act to Regulate Commerce in that respect.⁴⁷ The finding of the jury determines whether the transportation service was under "substantially similar circumstances and conditions," so as to make the defendant liable in a suit in the courts for damages for granting secret allowances to plaintiffs' competitors.⁴⁸ The fundamental distinction should be insisted upon that the Act

⁴⁴ See *Boise Commercial Club v. Adams Express Co.*, 17 I. C. C. 115, the third case mentioned in this section, and *Sage & Co. v. Ill. C. Ry.*, 18 I. C. C. 195, the fourth.

⁴⁵ *Little Rock & M. R. Co. v. St. Louis & S. W. Ry.*, 63 Fed. 775, 11 C. C. A. 417.

⁴⁶ *United States v. C. R. & Nav. Co.*, 159 Fed. 975.

⁴⁷ *United States v. Wells, Fargo Exp. Co.*, 161 Fed. 606.

⁴⁸ *Langden v. Penna. R. R.*, 194 Fed. 486.

does not prohibit all discrimination, but only that which is undue.⁴⁹ But any concession which is made in the schedule must not exceed that which is warranted by the differences in circumstances and conditions.⁵⁰ Not all discriminations are unlawful, but only such as are undue or unreasonable; if based on reason and good cause, differentials cannot be condemned as unreasonable.⁵¹ Discriminations in the view of the Act, in so far as they result from the bona fide action of a carrier in meeting circumstances and conditions not of its own creation and affecting the movement of traffic, do not of necessity fall under the condemnation of the law.

§ 660. Where no public service involved.

No violation of the Act can be predicated solely upon the fact that a carrier makes with one independent company a contract more favorable than with another for a service which that carrier is bound to perform as part of its duty in connection with transportation or undertakes to perform as a convenience to those whom it is serving. The Act deals only with the obligation of carriers as carriers, and in no way attempts to regulate or interfere with matters not involving their duties as such. Thus compression of cotton is a service which the carrier procures for its own convenience, and when that service is performed, in such a manner as not to prejudice or prefer a particular shipper or community, the Act does not limit the freedom of the carrier in making contracts in respect thereto.⁵² Upon similar principles it has been held by the courts that the Commission has no power to forbid carriers from paying or allowing for the elevation and transfer of grain to elevator men who were also shippers of grain reasonable compensation for transit elevation, because they were also

⁴⁹ *Loch Lynn Construction Co. P., C., C. & St. L. Ry.*, 13 I. C. C. v. B. & O. R. R., 17 I. C. C. 396. 87.

⁵⁰ *Sondheimer Co. v. I. C. R. R.*, 17 I. C. C. 60.

⁵² *Merchants' Cotton Press & Storage Co. v. I. V. R. R.*, 17 I. C. C.

⁵¹ *Pittsburgh Plate Glass Co. v.* 98.

performing at prices fixed by them other services not necessarily connected with transportation.⁵³ It is, of course, obvious that station restaurants, news stands, barber shops, and similar private enterprises at railroad terminals are no part of transportation service.⁵⁴ And, in general, when there is nothing of the duty which the carrier owes its public involved, it may make such arrangements as may advance its interests.

⁵³ *Peavey & Co. v. Union Pac. R.*
R., 176 Fed. 409.

⁵⁴ *Southwestern Produce Distrib-
utors v. W. R. R.*, 20 I. C. C. R. 458.

CHAPTER XIV

FORMS OF ILLEGAL DISCRIMINATION

- § 670. Provisions of the Act.
- 671. The same rate for substantially similar services.

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- § 672. Whether concessions may be made in competition.
- 673. Competitive conditions do not justify discriminations.
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- 675. Concessions to get shipments from outlying territory.
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- § 680. Whether concessions may be made to large shippers.
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Topic C. Rebates to Exclusive Shippers

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§§ 670, 671] RAILROAD RATE REGULATION

Topic D. Concessions for Special Kinds of Business

- § 700. Different rates for goods used for different purposes.
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- 709. Special classes of passengers.

§ 670. Provisions of the Act.

Not only did the original Act forbid outright rebating, but also preferential treatment. Section 3 of the original Act provided that it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. However, section 1, as amended, permitted the issuance of mileage, joint mileage, excursion or commutation tickets, and when telegraph companies were put under the jurisdiction of the Commission reduced rates for night messages and press despatches were excepted. The discussion in previous chapters, such as Chapters IX and X as to what will make rates unjust or unreasonable, or preferential or prejudicial has also a direct bearing upon these sections.

§ 671. The same rate for substantially similar services.

In the preceding chapter the general principles as to discrimination were set forth, and the conclusion was reached that if two shippers asked the same service under the same conditions they ought to be given the same rate. In this chapter it is proposed to describe what sub-

stantially identical services are, and various cases are discussed, where the contention has been made that the conditions were different. In most of the cases in this list, it will be seen upon examination that the services are not dissimilar. Whenever a railroad initiates a policy which will get it more business, or enable it to hold the business that it has, it is prone to claim that the differing conditions in the particular case justify making a lower rate to one shipper or class of shippers, while maintaining higher rates for other shippers. But, in many such cases, it will be found that what the railroad is doing is in the face of the principal rule forbidding personal discrimination.

Topic A. Concessions to get Competitive Business

§ 672. Whether concessions may be made in competition.

The idea runs through certain cases that it is justifiable to make reductions to certain shippers where business cannot be obtained without it. This principle, as has been seen, has some scope in permitting the rates to stations where there is competition to be made lower relatively than the rates to stations which have no competitive rates.⁵⁵ But it may well be doubted whether it has any operation in justifying a difference in rates between two persons shipping from the same station; for this would seem to be personal discrimination since these two shippers are asking the same service. To some courts it has seemed otherwise, these courts holding that if concessions are necessary to get more business by inducing a shipper who is now employing a rival route to give up his present connections, this necessity justifies the reductions. This

⁵⁵ Concessions to get competitive business have been justified in some cases, even if they involve discrimination. *Johnson v. Pensacola & P. R. R.*, 16 Fla. 623, 26 Am. Rep. 731; *Chicago & A. R. R. v. Coal Co.*, 79 Ill. 121; *Lough v. Outerbridge*, 143

N. Y. 271, 38 N. E. 292, 42 Am. St. Rep. 712, 25 L. R. A. 674, *Avinger v. So. Car. R. R.*, 29 S. C. 265, 7 S. E. 493, 13 Am. St. Rep. 716; *Ragan & Buffet v. Aiken*, 9 Lea (77 Tenn.), 609.

argument apparently disregards the law of public service which, of course, governs this whole question.⁵⁶

§ 673. Competitive conditions do not justify discriminations.

It must be insisted upon at the outset that competitive conditions in themselves do not justify the making of personal discriminations between shippers, giving a lower rate to those to whom it is necessary to make concessions. This is forbidden both by the English courts and by the United States courts under their respective Acts forbidding discrimination, but permitting reasonable concessions when the conditions are dissimilar. Thus in the leading case of *London and Northwestern Railroad v. Evershed*,⁵⁷ it was said: "We think that a railway company cannot, merely for the sake of increasing their traffic, reduce their rates in favor of individual customers, unless, at all events, there is a sufficient consideration for the reduction which shall lessen the cost to the company of the conveyance of their traffic, or some other or equivalent or other services are rendered to them by such individuals in relation to such traffic." And in the important case of *Interstate Commerce Commission v. Texas and Pacific Railroad Company*⁵⁸ it was said: "The Interstate Commerce Act would be emasculated in its remedial efficacy, if not practically nullified, if a carrier can justify a discrimination in rates merely upon the ground that unless it is given, the traffic obtained by giving it would go to a competing carrier. A shipper having a choice between competing carriers would only have to refuse to send his

⁵⁶ But by the better view such concessions are held unjustifiable, when they involve discrimination. *Wight v. United States*, 167 U. S. 512, 42 L. ed. 258, 17 Sup. Ct. 822; *Menacho v. Ward*, 27 Fed. 529, B. & W. 372; *Messenger v. Pennsylvania R. R.*, 7 Vroom (36 N. J. L.), 407, 13 Am. Rep. 457, 8 Vroom (37

N. J. L.), 531, 18 Am. Rep. 754, B. & W. 357; *Brundred v. Rice*, 49 Ohio St. 640, 32 N. E. 169, 34 Am. St. Rep. 589; *Fitzgerald v. Grand Trunk Ry.*, 63 Vt. 169, 22 Atl. 76, 13 L. R. A. 70.

⁵⁷ L. R. 3 App. Cas. 1029.

⁵⁸ 52 Fed. 187.

goods by one of them unless given exceptional rates to justify that one in making a discrimination in his favor on the ground of the necessity of the situation."

§ 674. Reductions to get competitive business illegal.

Such reductions to get business from a rival line are regarded as personal discrimination in most cases, however complicated the facts. This is a matter upon which the English cases have been particularly strong in holding that it is not sufficient that the railway company merely desires to attract the traffic from another line to itself, especially where the favor thus shown to a few is prejudicial to many others in the same trade as the favored persons.⁵⁹ Thus the fact that one shipper can go by another route and will probably do so if charged as much as the charge made to the complaining party, is not a circumstance justifying an unequal charge; nor will the fact that those charged a less rate are seeking to develop a new trade.⁶⁰ For the lowering of rates for the purpose of developing business is an undue preference;⁶¹ and so is making a lower rate in consequence of a threat from the owner of a colliery to construct another railway, by which traffic would be diverted.⁶²

§ 675. Concessions to get shipments from outlying territory.

It has been seen that some courts permit any difference in the situation to be seized upon as a reason for making a discrimination. Thus in *Ragan & Buffet v. Aiken*,⁶³ where a bill in equity was filed by merchants at a station on the defendant's railway who were charged a twenty-five-cent rate, who alleged that other shippers who brought

⁵⁹ *Thompson v. London, etc., R. Co.*, 2 Nev. & Mac. 115. 1 C. B. (N. S.) 454, s. c., 26 L. J. C. P. 129, 1 Nev. & Mac. 72.

⁶⁰ *Denaby Main Colliery Co. v. Manchester, S. & L. R. Co.*, L. R. 11 App. Cas. 97. ⁶¹ *Harris v. Cockermouth & W. R. Co.*, 3 C. B. (N. S.) 693, s. c., 27 L. J. C. P. 162, 1 Nev. & Mac. 97.

⁶² *Oxlade v. North Eastern R. Co.*, ⁶³ 9 Lea (77 Tenn.), 609.

their goods from an outlying district were charged only a fifteen-cent rate, the court sustained a demurrer to the bill, taking the ground that there was a difference shown in the circumstances. The argument of Mr. Justice Cooper in writing the opinion of the court was: "In determining whether or not a company has given undue preference to a particular person, the court may look to the interests of the company. In other words, if the charge on the goods of the party complaining is reasonable, and such as the company would be required to adhere to as to all persons in like condition, it may, nevertheless, lower the charge to another person if it be to the advantage of the company, *not inconsistent with the public interest*, and based on a sufficient reason. It is obvious that the intention of the defendant, in this instance, was not to discriminate against the complainants in favor of any person of the same place, and in the same condition. His object was to get business for his road from persons at a distance from its terminus, which otherwise would reach their destination by a different route. Under these circumstances we cannot see that the contracts complained of are against public policy, or that the complainants have been damaged, if the charges on their goods were reasonable." ⁶⁴

§ 676. Such concessions forbidden by later cases.

But such concessions have always been forbidden in the cases under the Act as illegal discrimination. Thus in one proceeding before the Commission,⁶⁵ the facts shown were that a higher rate was charged to goods brought to one terminus for consumption there, than for goods which were to be carted beyond to another district, and in de-

⁶⁴ In the important case of *Johnson v. Pensacola & P. R. R.*, 16 Fla. 623, 26 Am. Rep. 731, the facts and the decision were the same.

⁶⁵ *Cary v. Eureka Springs Ry.*, 7 I. C. C. Rep. 286.

Competition is not to be considered in determining a question of discrimination under section 2. In *re Advances on Manganese Ore*, 25 I. C. C. 663.

claring this illegal, it was said: "In collecting more from complainants and others for carrying goods to Eureka Springs, not to be forwarded, than they accept for carrying goods of the same classes from the same places to Eureka Springs to be forwarded to points in said Harrison transportation district, the defendants receive greater compensation from complainants than from other persons for 'a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions,' and are guilty of unjust discrimination; and in thus denying to complainants and other shippers of articles to Eureka Springs, for use there or for distribution from that place, the same transportation charges which they accord to shippers and receivers of like articles there to be forwarded to Harrison and other places for distribution, the defendants subject the complainants, the business in which they are engaged, and the city of Eureka Springs to unreasonable disadvantage and give to Harrison and such other places, and to shippers and receivers of articles of freight at such other localities, undue preference." ⁶⁶

§ 677. Shippers making expensive preparations.

In *Brundred v. Rice*,⁶⁷ a shipper of oil set forth in his complaint a most extraordinary state of affairs—a contract whereby a railroad company bound itself to carry for one shipper crude petroleum at half the rate it agreed to charge all others, and to pay such favored shipper one-half the amount collected from others, in consideration

⁶⁶ Compare *Bigbee & W. R. Packet Co. v. Mobile & Ohio R. R.*, 60 Fed. 545, where the court laid it down as a fundamental principle that all goods offered for shipment at a certain point must be carried at the established rate for such goods from such point, regardless of the place where they originated.

Threat of compress company to divert its cotton traffic to another railroad is not competition that relieves from the operation of the statute. *Muskogee Commercial Club v. M., K. & T. R. Co.*, 12 I. C. C. 312.

⁶⁷ 49 Ohio St. 640, 12 N. E. 169, 34 Am. St. Rep. 589.

of his agreeing to establish and maintain a system of pipe lines to its road. An extract from the *per curiam* opinion follows: "That the contract between Brundred and his associates was against public policy, and void, will hardly admit of a question. As said by Baxter, J., in *Handy v. Railroad Co.*:⁶⁸ 'Railroads are constructed for the common and equal benefit of all persons wishing to avail themselves of the facilities which they afford. While the legal title thereof is in the corporation or individuals owning them, and to that extent private property, they are, by the law and consent of their owners, dedicated to the public use. Except in the mode of using them, every citizen has the same right to demand the services of railroads, on equal terms, that they have to the use of a public highway, or the government mails.' Whatever may have been the financial condition of the railroad company, it was not warranted in making a contract by which it bound itself to carry for one shipper at half the rate it agreed to charge all others for the same service, in consideration of his agreeing to establish a system of pipe lines to its road; at the same time and for the same consideration binding itself to charge all others double the amount as a fixed, open rate, and to pay to such favored shipper one-half of it when collected."

§ 678. Additional services performed for certain shippers.

Upon the general principles now under discussion, it will constitute discrimination to perform additional services for certain shippers in order to get their business. The issue has several times been raised whether it would be permissible for a railroad to make allowance for cartage to certain shippers distant from the station, while making no such allowance to other shippers, and the decision has always been that this would be illegal discrimination. For the feeling has been universal that the varying cost of shippers in delivering to the carrier for shipment can

⁶⁸ 31 Fed. 689.

have no bearing on the case. In the most important case on this point,⁶⁹ Mr. Justice Brewer said: "It is contended by the defendant that it was necessary for the Baltimore & Ohio Company to offer this inducement to Mr. Bruening in order to get his business, and not necessary to make the like offer to Mr. Wolf, because he would have to go to the expense of carting, by whichever road he transported; that therefore the traffic was not 'under substantially similar circumstances and conditions,' within the terms of section 2. We are unable to concur in this view. Whatever the Baltimore & Ohio Company might lawfully do to draw business from a competing line, whatever inducements it might offer to the customers of that competing line to induce them to change their carrier, is not a question involved in this case. The wrong prohibited by the section is a discrimination between shippers. It was designed to compel every carrier to give equal rights to all shippers over its own road, and to forbid it by any device to enforce higher charges against one than another."⁷⁰

§ 679. Concessions to certain localities.

Whether a concession made in certain localities constitutes discrimination seems not to be altogether settled, although on the authorities it would seem to be clear enough that differences in the basis upon which service is rendered in various localities do not in themselves constitute discrimination. The Supreme Court has held that giving cartage to the patrons in one city while making no such provision in others named, did not constitute a violation of the Act.⁷¹ In a recent proceeding before the Commission,

⁶⁹ *Wight v. United States*, 167 U. S. 512, 42 L. ed. 258, 17 Sup. Ct. 822.

⁷⁰ See to the same effect, *Hazel Milling Co. v. St. Louis, A. & T. H. R. R.*, 5 I. C. C. Rep. 57; *Chicago F. P. C. Co. v. Chicago & N. W. Ry.*, 8 I. C. C. Rep. 316; *The Brandt Mill-*

ing Co.'s Case, 4 Can. Ry. Cas. 259.

⁷¹ *Interstate Commerce Commission v. Detroit, G. H. & M. Ry.*, 167 U. S. 633, 42 L. ed. 306, 17 Sup. Ct. 986.

See also *Re Wharfage Charges at Texas City*, 26 I. C. C. 695, discussed in the next sentence.

it appeared that, to overcome natural disadvantages as respects other neighboring ports, Texas City interests offered generally free wharfage, and to large shippers warehousing services, at less than cost, but no opinion was expressed as to the legality of such deals, for generally speaking, in order to violate the Act the prejudice must result from something done by the carrier. Likewise it is not held to be an undue preference of one locality over another under the Act to perform a switching service at one point which is refused at another.⁷² The same principle applies to various matters relating to transit privileges granted by the carrier for traffic movements at one point, while not doing so at another.

Topic B. Concessions to Large Shippers

§ 680. Whether concessions may be made to large shippers.

Common carriers have often given special discounts to large shippers in order to get their trade or to retain it, and sometimes they have attempted to defend this practice upon general principles. That this policy may often be advantageous in public business, as it is in private business, may be admitted, but it has already been seen that public duty may conflict with business policies. If, therefore, these concessions to larger shippers are in conflict with the public duty which the common carrier owes to smaller shippers, they must be held illegal as unjust discriminations. And this will be the clearer when it is shown that the favoring of such large shippers will give them such commercial advantages that they may crush out their smaller competitors in the common markets. The rule forbidding the granting of special reductions to larger shippers as such on the ground that they furnish a greater aggregate of business to the common carrier is, therefore, a necessary part of the law forbidding all personal dis-

⁷² *Alan Wood I. & S. Co. v. Pa. Ry.*, 22 I. C. C. 540.

See also *Bascom Co. v. A., T. & S. F. Ry.*, 17 I. C. C. 354, discussed in the next sentence.

crimination.⁷³ "The fact that one man is a large shipper and another a small shipper does not entitle the carrier to make a difference in the rate, if the property carried in each case is of the same class, and the distance and route is the same."⁷⁴

§ 681. Unreasonable differences universally forbidden.

All courts now agree that if there is an unreasonable difference made between the rates given to the large patron and the rates charged a small patron, the schedule is illegal in that respect. The most recent case which brings out this test is *Western Union Telegraph Company v. Call Publishing Company*,⁷⁵ where the plaintiff complained of a \$5 rate per 100 words daily per month charged it for news despatches while its contemporary was charged only \$1.50. Mr. Justice Brewer pointed out that it could not be said, even in this case, that the apparent discrimination could not be justified; for the general principle as he pointed out has two sides. Of course, such equality of right does not prevent differences in the modes and kinds of service and different charges based thereon. There is no cast iron line of uniformity which prevents a charge from being above or below a particular sum, or requires that

⁷³ The quotation which follows is from *United States v. Tozer*, 39 Fed. 369.

⁷⁴ By the weight of authority it is illegal to make reductions to large shippers as such. The principal cases are listed below: *Western U. T. Co. v. Call Pub. Co.*, 181 U. S. 92, 45 L. ed. 765, 21 Sup. Ct. 561, overruling s. c., 44 Neb. 326, 62 N. W. 506; *Hays v. Pennsylvania Co.*, 12 Fed. 309, B. & W. 368; *Burlington, C. R. & N. Ry. v. N. W. Fuel Co.*, 31 Fed. 652; *Kinsley v. Buffalo, N. Y. & P. Ry.*, 37 Fed. 181; *United States v. Tozer*, 39 Fed. 369; *Fitzgerald v.*

Grand Trunk Ry., 63 Vt. 169, 22 Atl. 76, 13 L. R. A. 70.

But see *Savitz v. Ohio & M. Ry.*, 150 Ill. 208, 37 N. E. 235, 27 L. R. A. 626, affirming 49 Ill. App. 315; *Cook v. Chicago, R. I. & Pac. Ry. Co.*, 81 Iowa, 551, 46 N. W. 749, 25 Am. St. 512, 9 L. R. A. 764; *Rothschild v. Wabash, St. L. & P. C. R.*, 92 Mo. 91, 4 S. W. 418; *Concord & P. R. R. v. Forsaith*, 59 N. H. 122, 47 Am. Rep. 181; *Silkman v. Yonkers Water Commissioners*, 152 N. Y. 327, 46 N. E. 612, 37 L. R. A. 827.

⁷⁵ *Western Union Telegraph Co. v. Call Publishing Co.*, 181 U. S. 92, 45 L. ed. 765, 21 Sup. Ct. 561.

the service shall be exactly along the same lines. But that principle of equality does forbid any difference in charge which is not based upon difference in service, must have some reasonable relation to the amount of difference, and cannot be so great as to produce an unjust discrimination.^{76a}

§ 682. Unreasonable differences forbidden by all courts.

Indeed, long before this in the case of *Burlington, Cedar Rapids and Northern Railway Company*,⁷⁶ which is often cited in this connection, Mr. Justice Brewer said in part: "If it be true, as held by Judge Wallace, that the rule forbidding an unjust discrimination does not necessarily prevent a railroad company from charging a less rate to one who ships a large quantity than to one who ships a small quantity (and I am not prepared to deny that under some circumstances, there is force in that proposition, on the same principle that a wholesale dealer sells a large bill of goods at a less rate than a small bill of goods), yet, even with that limitation, a discrimination so vast as this is, and so purely arbitrary, and which is so obviously solely in the interest of capital, and not based upon reasonable distinction in favor of a large as against a small shipper, cannot be sustained. For here the contract provides a special rate for shipment of 100,000 tons or over; that is, for one who ships 99,500 tons it makes a rate of \$2.40; while to the man who ships 100,000 tons, or 500 tons more than the other, it makes a rate of \$1.60,—a difference of 50 per cent in favor of the latter. Such a discrimination, even if any discrimination based upon the amounts of shipments is tolerable, is one so gross that it cannot be sustained."⁷⁷

^{76a} See also *Rothschild v. Wabash, St. L. & P. C. Ry.*, 92 Mo. 91, 4 S. W. 418; and *Cook v. Chicago, R. I. & P. Ry.*, 81 Iowa, 551, 46 N. W. 1080, 25 Am. St. Rep. 512, 9 L. R. A. 764.

⁷⁶ *Burlington, C. R. & N. Ry. v. Northwestern Fuel Co.*, 31 Fed. 652.

⁷⁷ But see *State v. Central St. Ry.*, 81 Vt. 463, 71 Atl. 194, 130 Am. St. Rep. 1065.

§ 683. Reasonable differences permitted by some courts.

In a very few jurisdictions it has been held that there is no legal objection to making a reasonable difference in the rates given to large shippers in comparison with the rates charged small shippers. The argument is that this is a business policy universally practiced; but the answer seems to be that this may nevertheless be opposed to the peculiar duties which the common carrier owes to the public as a whole. However, an extract is given from the opinion of Mr. Justice Allen in *Concord and Portsmouth Railroad Company v. Forsaithe*,⁷⁸ so that the weight of this argument may be felt. In holding that the complainant, a small shipper, had no case, even under a statute which forbade discriminations, he said: "The terms of the statute must receive the interpretation which long-established usage and the custom of the commercial world have given them. That custom in all branches of business always has been, and is, to move, care for, and sell a large amount of a given commodity, in one parcel or in a given time, at a less price per pound, yard, or ton, than a smaller quantity of the same commodity, distributed in many and smaller parcels at different times. The expense of handling, carrying, and storing the smaller amount is much greater, *pro rata*, than that of the same operations upon the larger amount in one body, and a discrimination in favor of the larger dealers is not inequality, but reasonable equality. By any other construction the statute would defeat itself; for taking into account the lessened expense *pro rata* for transporting the greater amount of property in a single body or in a given time, the carrier would, by absolute equality of rates for all cases, receive a greater price rate for carrying the larger quantity than the smaller, and thereby make an unjust discrimination against the person transporting the largest quantity of goods. Unreasonable equality is inequality."⁷⁹

⁷⁸ 59 N. H. 122.

Water Commissioners, 152 N. Y. 327,

⁷⁹ To the same effect is *Silkman v.* 46 N. E. 612, 37 L. R. A. 827.

§ 684. Prevalent doctrine against reduction.

It may be asserted with confidence, however, that it is opposed to fundamental principles to permit the giving of special concessions to the large shipper as such. In the leading case of *Hays v. Pennsylvania Company*,⁸⁰ this doctrine is well worked out. It appeared in evidence that defendant's regular price for carrying coal between the points mentioned, in 1876, was \$1.60 per ton, with a rebate of from 30 to 70 cents per ton to all persons or companies shipping 5,000 tons or more during the year,—the amount of rebate being graduated by the quantity of freight furnished by each shipper. In an excellent opinion by Baxter, the United States Circuit Judge, the various grounds upon which differences in rates have been justified by reason of differences in the cost of service by reason of economies of handling the business were reviewed, but he held very properly that none of these applied to the exclusive shipper as such: "In all particulars the plaintiffs occupied common ground with the parties who obtained lower rates. Each tendered coal for transportation in the same condition and at such times as suited his or their convenience. The discrimination complained rested exclusively on the amount of freight supplied by the respective shippers during the year. Ought a discrimination resting exclusively on such a basis be sustained? If so, then the business of the country is, in some degree, subject to the will of railroad officials; for, if one man engaged in mining coal, and dependent on the same railroad for transportation to the same market, can obtain transportation thereof at from 25 to 50 cents per ton less than another competing with him in business, solely on the ground that he is able to furnish and does furnish the larger quantity for shipment, the small operator will sooner or later be forced to abandon the unequal contest and surrender to his more opulent rival. If the principle is sound in its application to rival parties engaged in mining

⁸⁰ 12 Fed. 309.

coal, it is equally applicable to merchants, manufacturers, millers, dealers in lumber and grain, and to everybody else interested in any business requiring any considerable amount of transportation by rail; and it follows that the success of all such enterprises would depend as much on the favor of railroad officials as upon the energies and capacities of the parties prosecuting the same."⁸¹

§ 685. Reductions to large shippers unjust to small shippers.

Naturally the practice of some railroads under some circumstances of making lower rates to large customers was one of the first complaints brought to the Interstate Commerce Commission. One of those cases was *Providence Coal Company v. Providence & Worcester Railroad Company*,⁸² in which case it appeared that the tariff of the railroad on coal contained a provision for a discount of 10 per cent to any person, firm or company, who shall receive consignments of coal, in any one year, amounting to 30,000 tons or upwards, at any one station on the line of this road. But the Commission was very plainly set against any such differential, Mr. Commissioner Cooley saying: "The discrimination is therefore necessarily unjust within the meaning of the law. It cannot be supported by the circumstance that the offer is open to all; for although made to all, it is not possible that all should accept. Moreover, in testing such a discrimination we must consider the principle by which it must be supported; and the principle which would support a 30,000 ton limitation would support one of 50,000 or 100,000 equally well; the quantity named would be arbitrary in any case. It might easily be so high as practically to be open to the largest dealer only. A railroad company, if allowed to do so, might in this way hand over the whole trade on its road

⁸¹ Discussing particularly *Nicholson v. Gt. Western Ry.*, 5 C. B. (N. S.) 366.

⁸² 1 Int. Com. Rep. 363, 1 I. C. C. Rep. 107.

in some necessary article of commerce to a single dealer; for it might at will make the discount equal to or greater than the ordinary profit in the trade; and competition by those who could not get the discount would obviously be then out of the question. So extreme a case would not, however, be needful to show the inadmissibility of such a discount as is here offered; the injustice would be equally manifest if several dealers instead of one were able to accept the offer. A railroad company has no right, by any discrimination not grounded in reason, to put any single dealer, whether a large dealer or a small dealer, to any such destructive disadvantage.”⁸³

§ 686. Services to large and small practically identical.

Moreover, the services to large shippers and to small shippers are practically identical. The large shipper, to be sure, sends more carloads in the aggregate than the small shipper, it was truly said in a court proceeding, but it makes no real difference whether a railroad takes two cars from A or one car each from A and B. And it is plain that to carry two barrels of sugar for one person on a given date, and to carry one barrel of sugar for another person, between the same points, over the same route, two days later, are contemporaneous, and like services.⁸⁴ The argument was pressed further in another case of the same period; it is not in the least certain that the shipper who furnished the largest aggregate tonnage during the year may not have shipped in the most irregular way in the most inconvenient quantities. “This charge is justified by the master upon the ground that the quantity of oil shipped by another shipper was much larger than that shipped by the petitioner, and hence that the larger proportionate expense attending the handling and transporta-

⁸³ The Commission has lately said that a lower rate is not permitted to large shippers providing unloading facilities, than would be accorded to smaller shippers, unable to provide

such facilities. In re Restricted Rates, 20 I. C. C. 426.

⁸⁴ United States v. Tozer, 39 Fed. 369.

tion of the smaller shipment warranted a higher rate than was charged for the larger shipment. In this conclusion we do not agree with the learned master. It does not differentiate the service performed for the several shippers, nor the conditions or circumstances under which it was performed. The only difference is that in one case the quantity shipped was larger, and in the other case it was smaller. This has been repeatedly held to be an insufficient and unwarrantable reason for discriminating rates of charge."⁸⁵

§ 687. Differences in amount of shipment.

No dissimilarity of conditions which can justify a difference in rate is, therefore, created by the total amount of shipments during a certain time, as so much in a year.⁸⁶ A shipment of a large amount at one time may, however, justify a lower rate if it results in economy of operation, as for instance a carload shipment, provided the difference is reasonable in view of the saving effected.⁸⁷ So a rule making a minimum charge of one hundred pounds on shipments of less weight is justifiable.⁸⁸ If the amount of the shipment will not lead to a considerable saving in expense to the carrier, no difference can be made on account of it; so, where the shipment is in cargo or train-load quantities, it cannot get less than carload rates.⁸⁹ A railroad should not be permitted to adopt a system of rate making which will enable a large dealer to drive a small dealer out of the market, and the Commission cannot act on the theory that the trade of a particular community is a vested right belonging to any particular class

⁸⁵ *Kinsley v. Buffalo, N. Y. & P. R. R.*, 37 Fed. 181.

⁸⁶ *Providence Coal Co. v. Providence & W. R. R.*, 1 Int. Com. Rep. 363, 1 I. C. C. 107; *United States v. Toser*, 39 Fed. 369, 2 Int. Com. Rep. 597; *Kingsley v. Buffalo, N. Y. & P. Ry.*, 3 Int. Com. Rep. 318.

⁸⁷ *Thurber v. New York C. & H. R.*

R. R., 2 Int. Com. Rep. 742, 3 I. C. C. 473; *Buckeye Buggy Co. v. Cleveland, C., C. & S. L. R. R.*, 9 I. C. C. Rep. 620.

⁸⁸ *Wrigley v. Cleveland, C., C. & St. L. R. R.*, 10 I. C. C. Rep. 412.

⁸⁹ *Paine v. Lehigh Valley R. R.*, 7 I. C. C. Rep. 218.

in the community; and since the effect of an order prescribing differentials on less-than-carload quantities would be to place a tax on retailers in order that jobbers in southeastern territory might realize a profit in competition with Nashville jobbers and at the expense of that community, such an order should be refused.⁹⁰

§ 688. Reductions to groups of passengers.

Reductions to passengers in parties can only be justified if there is a difference in the cost of service. Thus such reductions were held by the Commission⁹¹ to forbid granting a special reduced rate to all persons traveling in parties of ten or more. The Commission ruled that the selling of "party rate" tickets was not within any of the discriminations specifically excepted and allowed by section 22 of the Act. The Supreme Court,⁹² however, rightly held that conveying one person singly and conveying him as one of a party of ten did not constitute like services, "under substantially similar circumstances and conditions," that the making of a lower rate per capita for party rate tickets was a due and reasonable preference and not unlawful discrimination. "In order to constitute an unjust discrimination under section 2 the carrier must charge or receive directly from one person a greater or less compensation than from another, or must accomplish the same thing indirectly by means of a special rate, rebate, or other device; but, in either case, it must be for a 'like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions.' To bring the present case within the words of this section, we must assume that the transportation of ten persons on a single ticket is substantially identical with the transportation of one, and, in view of

⁹⁰ *Duncan & Co. v. N. C. & St. L. Ry.*, 16 I. C. C. 590.

⁹¹ *Pittsburg, C. & St. L. R. Co. v.*

B. & O. R. Co., 2 Int. Com. Rep. 729, 3 I. C. C. Rep. 465.

⁹² *Interstate Com. Com. v. B. & O. R. R.*, 145 U. S. 263, 12 Sup. Ct. 844.

the universally accepted fact that a man may buy, contract, or manufacture on a large scale cheaper proportionately than upon a small scale, this is impossible."

§ 689. Special kinds of passenger transportation.

The Commission has no authority under the Act to require carriers to establish special fares, based upon less than the normal passenger-mile revenue, for the use of passengers on particular occasions or for special purposes.⁹³ But where a carrier has undertaken a definite and regular commutation service, the power as well as the duty of the Commission, under section 1, to examine into the reasonableness of the charges exacted, when complaint has been made, seems to be beyond question.⁹⁴ Upon duly established tariff authority therefor, the initial carrier may issue to a passenger a through ticket for the sum of two or more duly established fares applicable over the several connecting roads, composing the through line from the starting point to destination, which will cover the entire journey that the passenger desires to take.⁹⁵ It would seem to follow from what has been said that the issuance of mileage tickets is, therefore, optional.⁹⁶ And a special rate may be conditioned upon a certain number attending a convention under certain conditions.⁹⁷ It has long been established that party rates cannot be limited to particular classes, but must be opened to general public.⁹⁸ Apparently then no discrimination is shown from maintaining an excursion rate to and from one town, and refusing it at another.⁹⁹ But the Commission has recently held that a railroad ought to sell a 50-trip family ticket

⁹³ *Field v. Southern R.*, 11 I. C. C. 298.

⁹⁴ *Commutation Rate Case*, 21 I. C. C. 428; see also *Edelsten v. Pa. R. R.*, 26 I. C. C. 359.

⁹⁵ *In re Mileage, Excursion and Commutation Tickets*, 23 I. C. C. 95.

⁹⁶ *Eschner v. Pennsylvania R. R.*, 18 I. C. C. 60.

⁹⁷ *National Ass'n of Letter Carriers v. A., T. & S. F. Ry.*, 20 I. C. C. 6.

⁹⁸ *Re Party Rate Tickets*, 12 I. C. C. 95; see also *Koch Secret Service v. Louisville & N. Ry.*, 11 I. C. C. 523.

⁹⁹ *Ballin v. S. P. Co.*, 19 I. C. C. R. 503.

from Connecticut so long as they are sold from points in New York State.¹ Reduced rates restricted to school children have been said to be discriminatory;² but a carrier may sell children's tickets, open to all purchasers.³

Topic C. Rebates to Exclusive Shippers

§ 690. Lower rates formerly made to exclusive shippers.

The advantages which may accrue to the railroad company if it may make lower rates to those who will ship by it exclusively are plain; and this policy would largely prevail in making rates between competitive points doubtless if it were not for the recognition of its essential illegality. That such a policy may be advantageous to the company which employs it may be granted, but it has already been seen that those who conduct a public employment must forego many methods of getting business and holding it which are permissible in private affairs.⁴ The chief argument made in favor of such specially lower rates to those who will ship exclusively is to say that there is in reality no personal discrimination in such an arrangement when it is open to all who choose to conform to the condition. But this is as inconclusive here as it is when used in support of other kinds of discrimination between different shippers, for if the condition is one which it is inconsistent with public duty to impose, there is no legal justification for any departure from equality of rates to all who ask the same transportation for like goods.⁵

¹ Commutation Rate Case, 27 I. C. C. 549.

² In re Restricted Rates, 20 I. C. C. 426.

³ Re Commutation, 17 I. C. C. 144.

⁴ See Chapter X, *supra*. By the general rule it would seem to constitute illegal discrimination to give rebates to exclusive shippers. *Menchacho v. Ward*, 27 Fed. 529, B. & W. 372; *Louisville, E. & St. L. Con. R. Co. v. Wilson*, 132 Ind. 517, 32

N. E. 311, 18 L. R. A. 105 and note; *McNeer v. Mo. Pac. Ry.*, 22 Mo. App. 224; *Messenger v. Pennsylvania R. R.*, 7 Vroom (36 N. J. L.), 407, 13 Am. Rep. 457, 8 Vroom (37 N. J. L.), 531, 18 Am. Rep. 754, *Hilton Lumber Co. v. Atlantic Coast Line*, 136 N. C. 479, 48 S. E. 813; *Scofield v. L. S. & M. S. R. R.*, 43 Ohio St. 571, 3 N. E. 907, 54 Am. Rep. 846.

⁵ But see *Lough v. Outerbridge*, 143 N. Y. 271, 38 N. E. 292, 42 Am.

§ 691. Such discriminations foster monopolies.

One of the leading cases against personal discrimination is *Schofield v. Lake Shore & Michigan Southern Railway Company*.⁶ In that case it appeared that the railway company, having tariff rates for the public generally, contracted with the Standard Oil Company that, in consideration of said company giving to the railway its entire freight business in the products of petroleum, they would transport such freight for the company at certain rates, about ten cents per barrel cheaper than for any other customers whatsoever. The prayer of the bill brought by shippers for relief from this situation was granted in an elaborate opinion, the tenor of which may be judged from the following paragraph: "The principle is opposed to a sound public policy. It would build and foster monopolies, add largely to the accumulated power of capital and money, and drive out all enterprise not backed by overshadowing wealth. With the doctrine as contended for by the defendant, recognized and enforced by the courts, what will prevent the great grain interests of the northwest, or the coal and iron interest of Pennsylvania or any of the great commercial interests of the country, bound together by the power and influence of aggregate wealth, and in league with the railroads of the land, driving to the wall all private enterprises struggling for existence, and with an iron hand thrusting back all but themselves?"⁷

§ 692. Shippers who agree to give all their business.

The mere fact that a shipper agrees to give all his business to the carrier does not justify a concession from regular rates. Such inducements seem once to have been held out to shippers commonly in England; but the decisions of the courts have been against them.⁸ They have uniformly

St. Rep. 712, 25 L. R. A. 674, and *Fitchburg R. R. v. Gage*, 12 Gray (Mass.), 393.

⁶ 43 Ohio St. 571, 3 N. E. 907, 54 Am. Rep. 846.

⁷ See further, *Louisville, E. & St. L. C. R. R. v. Wilson*, 132 Ind. 517, 32 N. E. 311.

⁸ *Baxendale v. Great Western R. Co.*, 5 C. B. (N. S.) 309; *Diphwys*

held it unlawful preference to give reduced rates in consideration of an agreement to employ other lines of the company for the carriage of other traffic or to employ the company in other distinct business; which is obviously good law, as the carriage of goods to other points does not affect the cost of carriage between the particular points.⁹ Upon the same principles the railways have been forbidden to charge a higher wharfage rate on goods to be conveyed by another railway¹⁰ or to grant a reduced rate in consideration of a contract to carry all of certain goods and to prevent their being carried by water or other means.¹¹ It seems plain that in all of these cases no other decisions would have been justifiable than those which were given, because the policies pursued by the railways in all of these cases seem opposed to the public duty which the common carrier owes the shipping public.

§ 693. Consideration of the cost of serving.

Upon the principles set forth in the preceding paragraph it will be plain why it is permissible to make differences in the rating of the same goods based on the nature and size of the package, large packages being given relatively lower rates than small packages. And likewise if the shipment is in a form more convenient for handling, as in casks rather than in cases, or if the freight is tendered in a form permitting a greater carload, the difference between cotton in bulk and in tightly compressed bales for example, lower rates may be given proportionate to the difference in the cost of service.¹² "We are not unmind-

Casson Slate Co. v. Festining R. Co., 2 Nev. & Mac. 73; *Bellsdyke Coal Co. v. N. B. R. Co.*, 2 Nev. & Mac. 105.

⁹ *Baxendale v. Great Western R. Co.*, 5 C. B. (N. S.) 309; *Twellis v. Pa. R. R. Co.*, 3 Am. L. Reg. (N. S.) 728; *Bellsdyke Coal Co. v. North British R. Co.*, 2 Nev. & Mac. 105.

¹⁰ *Toomer v. London R. Co.*, 3 Nev. & Mac. 79.

¹¹ *Garton v. Bristol & E. R. R. Co.*, 1 Nev. & Mac. 218.

¹² These general considerations have already been discussed in Chapter XI. See *The Western Classification Case*, 25 I. C. C. 244, *passim*.

ful of the rule which permits a common carrier to discriminate in favor of a shipper who transports large quantities of a given commodity in one parcel at a time, as against a shipper who transports the broken packages. Such discrimination is rendered necessary by the increased expense of handling, storing, and caring for the smaller quantities, and is not unreasonable." ^{12a}

§ 694. Shippers requiring less service.

At common law formerly it could be shown in any case that the conditions under which particular shipments are made produce such economies in handling the traffic as to justify the reductions made in the rates. An excellent case to illustrate this general doctrine is *American Central Insurance Company v. Chicago & Alton Railway Company*,¹³ where the issue was raised whether a stipulation in a contract between a railroad company and its elevator lessee by which the former was to carry the latter's grain from the elevator in carload lots at less rate than its regular tariff, was justifiable. In holding that this did not constitute illegal discrimination Judge Smith said: "From the face of the lease it very clearly appears that the service for which the rebate was to be allowed the lessee, and those claiming under it, was not the same nor as great as the ordinary shipper. The transient shipper furnishes no warehouse for the storage nor any supervision of his grain nor the labor necessary to handle the same, but these are supplied wholly by the carrier. Not so of the lessee of the carrier who constructs his own storehouse and also supplies at his own expense the supervision and labor necessary for the care, storage and loading of his grain, the carrier thereby escaping much expense that it must incur in case of the transient shipper." ¹⁴

^{12a} *Louisville, E. & St. L. C. Ry. v. Wilson*, 132 Ind. 517, 32 N. E. 211. 114 N. Y. 330, 21 N. E. 403, 11 Am. St. Rep. 643, 4 L. R. A. 33, laying

¹³ 74 Mo. App. 89.

¹⁴ See *Root v. Long Island R. R.*, down the same principles in sweeping generalisations.

§ 695. Shippers who agree to furnish large quantities.

It would seem to follow, although this has appeared to some courts more doubtful, that shippers who agree to furnish large quantities of freight should have no better standing. It is true that the advantage to the railroad company may be proved, but the injustice to the small shipper who can make no such undertaking remains the controlling factor in the situation. This was well shown in an Indiana case¹⁵ where the court said: "It is contended by the appellant that, in view of the fact it secured by its contract with Dickason a certain income of \$7,000 per month, it could as well afford to carry ties for him at \$14 per car as to carry them for the appellees at \$24 per car. We find it unnecessary to inquire whether the appellant is correct or otherwise in this contention, for, as we understand the law, a railroad company engaged in the business of a common carrier is not permitted by the law to discriminate in favor of a shipper who is able to furnish a large amount of freight over one engaged in the same business who is unable to furnish the same quantity as that shipped by his more opulent rival. The reasons for prohibiting such discrimination are well stated in the case of *Hays v. Pennsylvania Co.* In our opinion, the fact that Dickason was able to furnish a larger number of carloads of ties for shipment than the appellees could constituted no sufficient reason for a discrimination in his favor over the rates charged to the appellees."¹⁶

§ 696. Charging other shippers more than contract rates.

In the interesting case of *Houston and Texas Central Railroad Company v. Rust*,¹⁷ the railroad and certain shippers entered into an agreement by which the shippers promised to ship all their goods and the railroad under-

¹⁵ *Louisville, E. & St. L. C. R. R. v. Wilson*, 132 Ind. 517, 32 N. E. 311.

¹⁶ *R. R. Co. et als., Appellants, v. R. R. et al.* 284.

An agreement between a corpora-

tion to give all its traffic to a R. R. Co. in consideration that R. R. Co. will subscribe to corporation bonds, is based upon sufficient consideration.

¹⁷ 53 Tex. 98.

took to give a certain rate. Later they raised other rates; but this in itself this court held not to be discrimination against other shippers. "It ought to have been submitted to the jury to determine whether under all the facts of the case, the defendant charged the plaintiffs a rate beyond what was reasonable, and beyond the price which was exacted of the public generally at the times when the plaintiffs shipped their cotton on the defendant's railroad. And, if, although the plaintiffs were not required to pay a higher rate than the public generally, yet if the defendant had allowed to certain particular persons or merchants in a certain particular locality, more advantageous terms than had been given to the public generally, or to the plaintiffs, it ought to have been submitted as an issue of fact for the jury to determine, whether (under appropriate instructions applicable to the subject), under all the evidence applicable to the question, such preference so given was a fair and legitimate one; one justified by the common-law rule forbidding the carrier to give one special privileges which it denies another, but which at the same time does not exclude as forbidden contracts for transportation at a less rate in special cases, where, under the circumstances, the discrimination appears reasonable." ¹⁸

§ 697. Competitive rates for through business.

But against preferential devices to hold business the recent American cases are clearly opposed. Thus in one Federal case, it was held that a lower rate could not be made for the transportation of goods from B to C which came from A, whence a competitive line to C ran.¹⁹ And in a recent State case it was held that a lower rate could not be made for transportation from A to B of goods

¹⁸ See also *Avinger v. So. Car. Ry., & O. R.*, 60 Fed. 545. See also *Brandt Milling Co. Case*, 4 Can. Ry. Cas. 259.
29 S. C. 265, 7 S. E. 493, 13 Am. St. Rep. 716.

¹⁹ *Bigbee & W. R. P. Co. v. Mobile*

destined to be forwarded from B to C.²⁰ Although the law thus no longer permits such concessions to get business, because it is seen that these would constitute personal discrimination between two customers asking exactly the same service, yet these considerations are still held to justify making a lower rate from a more distant point as will be seen in the last chapter of this part of the treatise. Where a competitive line exists at this point, it will even justify this even if the long haul includes the short haul within it. This means, of course, that the general law against all discrimination has not as yet become as recognized as the particular law against personal discrimination, but in regard to this relative discrimination the law is where it was as to all personal discrimination some time ago.

§ 698. Previous or subsequent haul.

The mere fact that the carrier will have later from the same patron a subsequent haul out-bound on manufactured articles does not justify the making to the shipper who is doing this a lower rate on the in-bound shipments of his raw materials; and it would seem to follow that the carrier cannot make a lower rate on the out-bound transportation to shippers who have previously given the in-bound traffic.²¹ And in a later case where a transit privilege had been established, the Commission condemned as unreasonable increases in local rates to transit points, which were to be refunded upon the shipment out-bound upon the products.²² In accordance with these principles the Commission has held, where the defendant's tariff provided a local rate on cottonseed into Fort Smith, Ark., with a provision that in case the shipper employed defendant's road in hauling the manufactured product out, he should

²⁰ *Alabama & V. R. R. Co. v. Railroad Comm.*, 86 Miss. 667, 38 So. 356. See also *Hope Cotton Oil Co. v. Texas & P. R. R.*, 10 I. C. C. Rep. 696.

²¹ *In re Substitution of Tonnage at Transit Points*, 18 I. C. C. 280.

²² *Red River Oil Co. v. T. & P. Ry.*, 23 I. C. C. 438.

be entitled to a refund of a part of the rate into Fort Smith, that such a provision was unlawfully discriminatory.²³ But the Commission in a recent case, apparently modified this by saying that carriers may in connection with transit privileges reduce their reasonable rates in consideration of getting out-bound shipments, but cannot add thereto any sum as penalty to be forfeited if the out-bound shipment does not move over same line which handled in-bound raw material.²⁴ It is probably true that in fixing rates in general weight may be given by the carrier to the fact that the free movement of the commodity is an auxiliary to the production of larger volume of traffic to the carriers.²⁵ But the Commission has declined to lower rates merely because the carrier had a previous haul on raw material.²⁶

§ 699. Other methods of holding business.

The general principle is that all goods offered for shipment at a certain point must be carried at the established rate for such goods from such point, regardless of the place where they originated.²⁷ And the Commission has recently ruled that local rates to a junction point should be same for all shippers to that point, and the through rate on shipments going beyond the junction should be alike for all shippers to the destination.²⁸ And an arrangement has been squarely condemned where a lower local rate was given, provided only the goods were originally shipped into a trading center over the defendant's lines, on the ground that such a rate was not in any sense a proportional rate, nor could it be sanctioned as a transit, reconsignment or diversion privilege, but was simply an unlawful device to compel shippers to send their goods over

²³ *Memphis Freight Bureau v. Ft. S. & W. R. R.*, 13 I. C. C. 1, 4.

²⁴ *May Bros. v. Y. & M. V. R. R.*, 26 I. C. C. 323.

²⁵ *Meridan Fertilizer Factory v. T. & P. Ry.*, 26 I. C. C. 351.

²⁶ *Paragon Plaster Co. v. N. Y. C. & H. R. R.*, 19 I. C. C. R. 480.

²⁷ See *Bascom Co. v. A., T. & S. F. Ry.*, 17 I. C. C. 354.

²⁸ *In re Restricted Rates*, 20 I. C. C. 426.

defendant's road.²⁹ And the general principle was again laid down in a still later case that a common carrier cannot impose an unreasonable rate because of the origin of the traffic.³⁰

Topic D. Concessions for Special Kinds of Business

§ 700. Different rates for goods used for different purposes.

It is strongly urged by the railroads that they should be allowed to make different rates for goods which are going to be used for different purposes. It is pointed out that in order to get more traffic, which by reason of the law of increasing returns is for the benefit of all concerned, it will often be necessary for them to make lower rates for goods which are going to be used for one purpose than for goods which are going to be used for another purpose.³¹ Moreover, the railroad managers take a higher plane of argument when they urge that to make different rates for different users they may further the development of the industries of the communities which they serve. But neither of these arguments can be pushed too far in a legal discussion because in so far as any railroad policy involves discrimination it is illegal; and to charge one of two shippers who wants exactly the same transportation of the same goods one rate while another shipper is charged another rate is personal discrimination *prima facie*.³²

²⁹ *Bascom Co. v. A., T. & S. F. Ry.*, 17 I. C. C. 354.

³⁰ *Acme Cement Plaster Co. v. C. G. W. Ry.*, 18 I. C. C. 19.

³¹ Whether concessions may be made for special kinds of business is a debated question. Such reductions were allowed in *Hoover v. Pennsylvania R. R.*, 156 Pa. St. 220, 27 Atl. 282, 36 Am. St. Rep. 43, 22 L. R. A. 263.

The Commission will refuse to sanction a classification resting upon

the use to which a commodity is put. *Metropolitan Paving Brick Co. v. A. A. R. R.*, 17 I. C. C. 197.

³² But in the following case such reductions are forbidden: *Fitzgerald v. Grand Trunk Ry.*, 63 Vt. 169, 22 Atl. 76, 13 L. R. A. 70.

The use to which a commodity is put affords no basis for a difference in rates under the Act. *Sligo Iron Store Co. v. A., T. & S. F. Ry.*, 17 I. C. C. 139.

§ 701. Such rates formerly allowed.

The argument for allowing the making of different rates for the same commodities which are destined to be used for different purposes is a strong one. How strong it is from an economic point of view may be seen by an examination of the leading case supporting this argument, *Hoover v. Pennsylvania Railroad*.³³ In that case the court held that an agreement to charge a uniform rate on shipment of coal to the Bellefonte Nail Works for consumption in operating its machinery could not be complained of as unjust discrimination against a mere dealer, who received his coal over the same road and was charged a higher rate, the court relying upon the broadest grounds of public policy to justify this result, Mr. Justice Green saying: "In point of fact, it is perfectly well known and appreciated that the output of freights from the great manufacturing centers upon our lines of transportation constitutes one of the chief sources of the revenues which sustain them financially. Yet no part of this income is derived from those who are mere buyers and sellers of coal. When the freight is paid upon the coal they buy, the revenue to be derived from that coal is at an end. Not so, however, with the revenue from the coal that is carried to the manufacturers. That coal is consumed on the premises in the creation of an endless variety of products, which must be put back upon the transporting lines, enhanced in bulk and weight by the other commodities which enter into the manufactured product, and is then distributed to the various markets where they are sold."³⁴

³³ 156 Pa. St. 220, 27 Atl. 282, 22 L. R. A. 263, 36 Am. St. Rep. 43.

See also *Louisville & W. R. R. v. Fulgam*, 91 Ala. 555, 8 So. 803.

³⁴ In *Missouri, K. & T. R. R. v. Trinity C. L. Co.*, 1 Tex. Civ. App. 553, 21 S. W. 290, the court left the question open, whether it was illegal discrimination for a railroad to fix

a lower freight rate for narrow gauge cars for use of railroads engaged in the carrying business than for those intended to be used for logging purposes.

In *Fry v. Louisville & W. Ry.*, 103 Ind. 265, 2 N. E. 744, a lower rate quoted for farm purposes passed scrutiny without objection.

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§ 702. Repudiation of this doctrine.

However, this doctrine is plainly inconsistent with the modern law against discrimination which in its development to-day insistently forbids all discrimination. This is well brought out in the Railroad Discrimination Case³⁵ where it was held that a carrier may not give one customer a lower rate of freight than another merely because the former ships the manufactured product over the carrier's line, Chief Justice Clark saying: "The proposition that a common carrier has a right to charge one person a lower rate of freight than another for shipping the same quantity the same distance, under the same conditions, provided the shipper give the company a consideration (shipping the manufactured lumber subsequently over its line), which its managers think will make good to it the abatement of rate given to such parties." "But if this is equality as to the treasury of the company," said Chief Justice Clark, "it is none the less a discrimination against the plaintiff."³⁶

§ 703. Such differences now held illegal discrimination.

When all has been said of special rates for manufacturers the fact of personal discrimination remains; and it is submitted that the law against personal discrimination has developed so far as to have become a positive rule for the benefit of all shippers.³⁷ An excellent illustration of this within a few years was the disposition made of this problem by the Canadian Railway Commission when this problem first came before them.³⁸ "The law is clear that the allowance of a reduction in the freight rate on any article of merchandise to one class of shippers and refusal

³⁵ *Hilton Lumber Co. v. Atlantic Coast Line*, 136 N. C. 479, 48 S. E. 813.

³⁶ See the further discussion of this case in an eloquent opinion against all discrimination in *Hilton Lumber Co. v. Atlantic C. L. Ry. Co.*, 141 N. C. 171, 53 S. E. 823.

³⁷ See *Duncan v. A., T. & S. F. Ry.*, 6 I. C. C. 85.

³⁸ *Manufacturers' Coal Rates Case*, 3 Can. Ry. Cas. 438. In *Manufacturers' Construction Material Case*, 3 Can. Ry. Cas. 427, the Commission foreshadowed this opinion.

of the same rate to another is unjust discrimination, and unjust discrimination is prohibited by the Railway Act. Common carriers are bound by every principle of justice and law to accord equal rights to all shippers who are entitled to like treatment both in the receiving of supplies and the shipment of their products, and a carrier who, under any pretext whatsoever, grants to one shipper an advantage which he denies to another violates the spirit and thwarts the purpose of the law. This is a statement of a conclusion arrived at by the Interstate Commerce Commission in a question very similar to the present and will be found in a case of *Castle v. Baltimore & O. Ry. Co.*,³⁹ and to this judgment and opinion this Board subscribes."⁴⁰

§ 704. Classification based upon use.

A carrier has no right to attempt to dictate as to the uses to which commodities transported by it shall be put, as its duty is to transport all goods offered at its tariff rates, and on equal conditions for all. Therefore, tariffs naming different rates on nitrate of soda when destined for the manufacture of fertilizer and that for the making of powder were held unlawful.⁴¹ The Commission has been set against the maintenance of different rates upon the same commodity dependent upon the use to which the article is put.⁴² Latterly a difference in the rate according to the use to which a commodity is put has received general condemnation in various opinions of the Commission.⁴³ In a recent proceeding it appeared that the

³⁹ 8 I. C. C. Rep. 333.

⁴⁰ In *Capital City Gas Co. v. Central Vt. Ry.*, 11 I. C. C. Rep. 103, the Interstate Commerce Commission held that it constituted illegal discrimination to make a rate of 90 cents per ton for bituminous coal for railroad supply while charging \$1.85 per ton to complainant and other consignees.

⁴¹ *Fort Smith Traffic Bureau v.*

St. L. & S. R. R., 13 I. C. C. 651.

⁴² *Hardie Mfg. Co. v. O. R. R. & N. Co.*, 24 I. C. C. 545; see also *Memphis Freight Bureau v. St. L. & S. F. R. R.*, 24 I. C. C. 602.

⁴³ Paper rates from Manitowoc and Milwaukee to Kaukauna, Wis., 28 I. C. C. 305; see also *Metropolitan Brick Co. v. A. A. R. R.*, 17 I. C. C. 197.

carrier had dual rates: first, an open rate on coke, and second a lower rate when the coke was for use in blast furnaces, but this was held improper, although it was publicly scheduled and open to all who qualified themselves for the lower rate.⁴⁴ It will be remembered that this principle against basing rating upon the use to which the article is put has already been discussed in the previous Chapter on Classification of Freights.

§ 705. Personality of shipper.

It would seem, therefore, to be fundamental that a rate cannot be confined in its terms or application to an individual or a class.⁴⁵ It is now well established that it is no defense to a charge of undue discrimination between manufacturers to urge that they are not engaged in the manufacture of the same or similar articles, and do not compete in the same markets.⁴⁶ The practice of naming specific consignors and consignees as entitled to special service has often been condemned.⁴⁷ Undue preference results from a demand for higher charges for new than demanded from old subscribers for same telephone service and facilities.⁴⁸ Rates on coal applicable only to shipments of certain consignors or consignees have been unhesitatingly condemned.⁴⁹ Even a railroad stands like every other shipper; and it is unlawful to apply one rule when a shipment is for a carrier, and a different rule when it is for a private individual.⁵⁰ The Supreme Court has finally settled this question by holding that a difference in rates to railroad consignees for fuel coal amounts to un-

⁴⁴ *St. Louis Blast Furnace Co. v. V. Ry.*, 25 I. C. C. 183.

⁴⁵ Improper to base rate upon use to which commodity may be put. *Anaconda Copper Mining Co. v. C. & E. R. R.*, 19 I. C. C. R. 592.

⁴⁶ *Virginia-Carolina Chemical Co. v. A. C. L. R. R.*, 22 I. C. C. 394.

⁴⁷ *Union Tanning Co. v. S. Ry.*, 25 I. C. C. 112.

⁴⁸ *Pierce Co. v. N. Y. C. & H. R. R. R.*, 19 I. C. C. 597.

⁴⁹ *Shoemaker v. C. & P. Tel. Co.*, 20 I. C. C. 614.

⁵⁰ *In re Restricted Rates*, 20 I. C. C. 741.

⁵¹ *Crescent Coal & Mining Co. v. B. & O. R. R.*, 23 I. C. C. 81.

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just discrimination under these sections of the Act.⁵¹ And the Commission has recently ruled that discrimination cannot be avoided if a competing electric line is not given same coal rates as are accorded steam railroad.⁵²

§ 706. Restricting rates to certain purposes.

It has been seen that it is now considered fundamental that a classification should not rest upon the use to which article is to be devoted.⁵³ It is, therefore, unlawful to maintain different rates of freight dependent upon use of the goods.⁵⁴ The principle is repeated in many opinions that a rate cannot be based upon the use to which the commodity is to be devoted.⁵⁵ Upon complaint of undue prejudice, in that competitors were granted a lower rate on coke intended for blast-furnace use, damages were awarded by the Commission for an unreasonable rate.⁵⁶ It is difficult to determine that one theory is reasonable and right for one manufacturer or shipper, and another theory is reasonable and right for another manufacturer or shipper under substantially similar circumstances and conditions.⁵⁷ The Commission has, therefore, condemned the maintenance of dual rates on a commodity, dependent upon the use to which the article is put.⁵⁸ And an advance due to discontinuance of dual rates based upon use is, therefore, justified.⁵⁹

§ 707. When commodities are of different character.

Of course different rates may be given when the commodities are not quite of the same character. This is

⁵¹ Interstate Commerce Commission v. Baltimore & O. R. R., 225 U. S. 326, 56 L. ed. 1107, 32 Sup. Ct. 742.

⁵² In re Restricted Rates, 20 I. C. C. 426.

⁵³ Jones Bros. Co. v. M. & W. R. R. R., 21 I. C. C. 577.

⁵⁴ Carter White Lead Co. v. N. & W. Ry., 21 I. C. C. 41.

⁵⁵ Virginia-Carolina Chemical Co. v. A. C. L. R. R., 22 I. C. C. 394.

⁵⁶ Stowe-Fuller Co. v. Pennsylvania Co., 12 I. C. C. 215.

⁵⁷ Douglas & Co. v. C., R. I. & P. Ry., 16 I. C. C. 232.

⁵⁸ Arkansas Fertilizer Co. v. St. L., I. M. & S. Ry., 25 I. C. C. 645.

⁵⁹ Wisconsin Steel Co. v. P. & L. E. R. R., 27 I. C. C. 152.

probably the explanation of a series of cases in Kentucky justifying a difference in rate between steam coal to manufacturers and domestic coal for dealers. Thus in *Commonwealth v. Louisville & Nashville Railroad Company*⁶⁰ the facts shown at the trial were that the electric light company was engaged in the business of manufacturing and selling electricity; that the coal transported to it was a very low grade of coal, commonly known as "slack," and was used by the company for steam purposes; that Wade was a coal dealer in Franklin, and that the particular carload of coal on which this proceeding was based was the highest grade of coal, known as "lump;"⁶¹ Upon a review of the authorities cited in the note⁶² the court held that "it was allowable and proper for a railroad company to classify freight according to its quality or character and marketable value; and discrimination in charges for carrying different classes or kinds is not only universally recognized, but plainly authorized by section 215. And that this settled the question since it was admitted in the pleadings and shown by proof that the respective carloads of coal upon which this action was founded were wholly different both as to quality and marketable value." The Commission has frequently had occasion to apply these principles, holding for instance in one important case not long ago that smithing coal, being of greater value than the ordinary bituminous coal, might properly under the Act be charged a higher rate per ton for the transportation.⁶³

§ 708. Rates to certain classes of shippers.

From what has been said it will be plain that it will usually constitute personal discrimination to give special

⁶⁰ 112 Ky. 783, 68 S. W. 1103.

⁶¹ Much the same facts appeared in *Louisville, E. & St. L. C. R. R. v. Crown Coal Co.*, 43 Ill. App. 228.

⁶² *Louisville & N. R. R. v. Com.*, 105 Ky. 179, 48 S. W. 416; *Louisville*

& N. R. R. v. Com., 108 Ky. 628, 57 S. W. 508; *Louisville & N. R. R. v. Com.*, 108 Ky. 628, 57 S. W. 511.

⁶³ *Sligo Iron Store Co. v. Union P. R. R.*, 19 I. C. C. 527.

rates to certain classes of persons upon designated sorts of goods. This complication appeared in one case before the Commission,⁶⁴ where it was shown that under the Western Classification and tariff there were two west-bound carload rates from Mississippi river points to Pacific coast terminals on goods termed "Emigrants' Movables" (including "household goods"), one a general class rate and the other designated a "commodity" rate and less than the general rate; the latter rate was published as being open to "intending settlers only." But the Commission said: "Unless within the authorized exceptions to the general rule of the statute, discriminations in charges upon like shipments of the same commodities based solely upon the purpose or 'business motive' of the shipper, are unlawful whether effected directly or indirectly by methods of classification." In a recent case in the Supreme Court it has held that differences with respect to competition between coal intended for railway consumption and other coal, and with respect to the manner of delivery, depending upon a difference in the facilities possessed by the railroads and other consignees, do not make the interstate traffic therein dissimilar in circumstances and conditions, within the meaning of the Act, so as to justify the giving of a lower rate for the transportation of railway fuel coal than is given to shipper of other coal between the same points.⁶⁵

§ 709. Special classes of passengers.

Granting lower rates with the customary accommodations to persons representing that they were traveling for the purpose of buying land or settling near the railroad

⁶⁴ *Duncan v. A., T. & S. F. Ry.*, 6 I. C. C. Rep. 85.

Denial of free transportation to a caretaker of chickens, not found unreasonable or unduly discriminatory. *Ream v. S. P. Co.*, 25 I. C. C. 107.

⁶⁵ Interstate Commerce Commis-

sion v. B. & O., 225 U. S. 326, 56 L. ed. 1107, 32 Sup. Ct. 742.

Carriers make low rates on emigrant movables to induce settlement along their lines. *R. R. Com'rs of Montana v. N. P. Ry. Co.*, 26 I. C. C. 482.

line has been held unlawful discrimination;⁶⁶ but special rates to emigrants, riding exclusively upon "emigrant trains" with poor accommodations have been permitted.⁶⁷ This distinction is well grounded upon the difference in the cost of service to the two classes. Classifications based upon the form of contract under which passengers are carried have been sustained, as in the case of allowing to a person riding upon a commutation ticket a lower rate than that allowed to one riding upon a mileage ticket; but it is not justifiable to sell such tickets to commercial travelers at a lower rate.⁶⁸ It has been held in England that a railroad may give an especially low rate for passenger service to shippers of freight in large quantities.⁶⁹ But in the United States this would undoubtedly be considered illegal discrimination, and quite within the principle as the giving of reduced rates to large shippers, which has been above considered illegal.⁷⁰ "In the transportation of passengers carriers are performing a public duty under franchises granted by the State, and are subject to the rules of law which require absolute impartiality to all, when the circumstances and conditions are substantially similar. The fact that their own interests may be promoted to some extent by swerving from this rule cannot be regarded as sufficient to warrant a departure from the obvious language of the Statute."⁷¹

⁶⁶ *Smith v. Northern P. R. R.*, 1 Int. Com. Rep. 611.

⁶⁷ *Savery & Co. v. N. Y. C. & H. R. R.*, 2 Int. Com. Rep. 210.

⁶⁸ *Associated Wholesale Grocers v. Mo. Pac. Ry.*, 1 I. C. C. Rep. 393.

⁶⁹ *Inverness Chamber of Commerce v. Highland Ry.*, 11 R. & T. Cas. 218.

⁷⁰ *Colorado Free Pass Investigation*, 26 I. C. C. 391.

⁷¹ *Smith v. No. Pacific R. R.*, 1 Int. Com. Rep. 611.

CHAPTER XV

INSTANCES OF JUSTIFIABLE DIFFERENCES

- § 710. Provisions of the Act.
- 711. Modification of the rule forbidding different rates.

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- § 740. Lighterage allowance.
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- 742. Transit privileges.
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§ 710. Provisions of the Act.

The provisions of the Act just considered, such as sections 2 and 3, forbidding disproportionate treatment where the circumstances are similar, by inference permit proportionate differences where the conditions are different. It should be noted, moreover, that since 1906 only such allowances as are published are permitted, section 6 providing that the requirements as to scheduling with the Commission shall apply to all traffic and transportation, facilities and arrangements in relation to any traffic affected by the provisions of the Act. As the Act now reads, if the owner of property transported in interstate commerce directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order. What differences are approved in passing upon rates has already been discussed in Chapters XI and XII.

§ 711. Modification of the rule forbidding different rates.

When the services asked of the carrier are essentially dissimilar the rule against discrimination is apparently much modified. It is rightly held that different rates may be made when the cost of service is different; for to enforce equal rates under those circumstances, as has been said, would in reality be discriminatory under ordinary condi-

tions.⁷² "It must not be inferred that a common carrier, in adjusting his price, cannot regard the peculiar circumstances of the particular transportation. Many considerations may properly enter into the agreement for carriage or the establishment of rates, such as the quantity carried, its nature, risks, the expense of carriage at different periods of time, and the like; but he has no right to give an exclusive advantage or preference, in that respect, to some over others, for carriage, in the course of his business. For a like service, the public are entitled to a like price. There may be isolated exceptions to this rule, where the interest of the immediate parties is alone involved, and not the rest of the public, but the rule must be applied whenever the service of the carrier is sought or agreed for in the range of business or trade."⁷³

Topic A. Reasonable Differences

§ 712. What preference is undue and unreasonable.

The words of the Act necessarily involve the idea or element of comparison of one service or traffic with another similarly situated and circumstanced, and require that, to be undue and unreasonable, the preference or prejudice must relate and have reference to competing parties, producing between them unfairness and an unjust inequality in the rates charged them, respectively, for contemporaneous service under substantially the same circumstances and conditions.⁷⁴ In determining the question whether rates give an undue preference or impose an undue prejudice or disadvantage, consideration must be had to the relation which the persons or traffic affected bear to each other and to the carrier. When and so long

⁷² The quotation is from *Messenger v. Pennsylvania R. R.*, 7 Vroom (36 N. J. L.), 407, 13 Am. Rep. 457, 8 Vroom (37 N. J. L.), 531, 18 Am. Rep. 754.

⁷³ See *Interstate Commerce Commission v. Baltimore & O. R. R.*, 145

U. S. 263, 36 L. ed. 699, 12 Sup. Ct. 844.

⁷⁴ This is virtually a quotation from *Interstate Commerce Commission v. Baltimore & O. R. R.*, 43 Fed. 37.

as their relations are similar or "substantially" so, the carrier is prohibited from dealing differently with them in the matter of charges for a like and contemporaneous service.⁷⁵ Undue preference involves comparison between the treatment given to shippers, and upon comparison a finding that one is unfairly treated. In short, any unreasonable inequality of treatment of passengers or shippers is a violation of the law.⁷⁶ So it is an unjust discrimination to remove a colored passenger holding a first class ticket from a first class car, to a second class car, less clean and comfortable; but separation of white and colored passengers paying the same fare is not unlawful, if cars and accommodations equal in all respects are furnished to both and the same care and protection of passengers observed.⁷⁷ So where a carrier refused to permit a side-track connection with its road to one coal mine, while permitting it to another under similar circumstances, it was held to be a violation of the Act. There must be such similarity of situation and feasibility of connection as will permit practical adherence to reasonable operating conditions by the carrier; but where physical conditions pertaining to the proposed connection are at least as favorable to the carrier as those pertaining to the other connections the applicant is entitled to his connection.⁷⁸

§ 713. Differences in transportation cost.

There is no illegal discrimination unless the services compared are substantially the same. Thus a reasonable classification of commodities or passengers according to the nature of the goods or the accommodations

⁷⁵ See *Interstate Commerce Commission v. Chicago G. W. Ry.*, 141 Fed. 1003.

⁷⁶ *Daniels v. Chicago, R. I. & P. Ry.*, 6 I. C. C. Rep. 458; *Page v. Delaware, L. & W. R. R.*, 6 I. C. C. Rep. 548; *Castle v. Baltimore & O. R. R.*, 8 I. C. C. Rep. 333.

⁷⁷ *Heard v. Georgia R. R.*, 1 Int. Com. Rep. 719, 1 I. C. C. 428; *Council v. Western & A. R. R.*, 1 Int. Com. Rep. 638, 1 I. C. C. 339; *Heard v. Georgia R. R.*, 2 Int. Com. Rep. 508, 3 I. C. C. 111.

⁷⁸ *Red Rock Fuel Co. v. Baltimore & O. R. R.*, 11 I. C. C. Rep. 438.

furnished does not result in discrimination.⁷⁹ "And for a like reason an inferior class of freight may be carried at a less rate than first-class merchandise of greater value and requiring more labor, care, and responsibility in the handling. It has been held that 20 separate parcels done up in one package, and consigned to the same person may be carried at a less rate per parcel than 20 parcels of the same character consigned to as many different persons at the same destination, because it is supposed that it costs less to receive and deliver one package containing 20 parcels to one man, than it does to receive and deliver 20 different parcels to as many different consignees. Such are some of the numerous illustrations of the rule that might be given."⁸⁰

§ 714. Certain economies in operation.

It has seemed an unjust discrimination, contrary to the spirit of the Act, to make allowances for services rendered by the locomotives of the competitors in hauling cars over private tracks.⁸¹ Likewise a lower rate to large shipper, providing elaborate facilities for prompt unloading, than accorded a small competitor, unable to provide such facilities, would constitute unjust discrimination.⁸² There is no illegal discrimination unless the services compared are substantially the same. Thus a reasonable classification of commodities or passengers according to the nature of the goods or the accommodations furnished does not result in discrimination.⁸³ Nor from a transportation view point can the carriage of products, of entirely different kinds

⁷⁹ For this general principle see among other cases: *Brewer v. Central of Ga. Ry. Co.*, 84 Fed. 258; *Wagner v. City of Rock Island*, 146 Ill. 139; *Louisville & N. Ry. Co. v. Com.*, 108 Ky. 628, 57 S. W. 508; *Paine v. Pennsylvania Ry.*, 7 Kulp, 187.

⁸⁰ The quotation is from *Hays v. Pennsylvania R. R. Co.*, 12 Fed. 309.

⁸¹ *Tap Line Cases*, 23 I. C. C. 277.

⁸² *In re Restricted Rates*, 20 I. C. C. R. 426.

⁸³ *Lavery v. New York C. & H. R. R. R.*, 2 Int. Com. Rep. 210, 2 I. C. C. 338; *New York Board of Trade and Transp. v. Pennsylvania R. R.*, 3 Int. Com. Rep. 417, 4 I. C. C. 447; *Brownell v. Columbus & C. M. R. R.*, 4 Int. Com. Rep. 285, 5 I. C. C. 638.

be compared.⁸⁴ Charges for terminal or other incidental services of entirely different kinds can not be compared, such as storage charges at warehouses and in stations,⁸⁵ delivery of goods on spur tracks and by drays,⁸⁶ and carriage through cities where bus transfer is and is not furnished.⁸⁷ But a difference in charge for carrying oil in tank cars and in barrels, where carriage in tank cars is not open to shippers impartially is questionable.⁸⁸

§ 715. Like circumstances and conditions.

The courts have frequently had occasion to define the phrase "like circumstances and conditions." Under section 2 of the Act forbidding a discrimination in rates between shippers for a haul under like circumstances and conditions, it has been held that the circumstances and conditions meant are those which arise within the field of haulage, and not those which exist outside.⁸⁹ In regard to State statute of like tenor, it has been said that, so far as it forbids unjust discriminations, such language is merely declaratory of the common law; and different rates may be made where the circumstances are different.⁹⁰ And in another State a statute penalizing discriminations in freight rates was construed to be applicable only to charges made against shippers for an equal quantity of same kind of freight going in same direction.⁹¹ In still another jurisdiction language similar to that in the Act was said to be merely declaratory of the common law not

⁸⁴ *Rice v. Cincinnati, W. & B. R. R.*, 3 Int. Com. Rep. 841, 5 I. C. C. 193; *Pennsylvania Millers' State Ass'n v. Philadelphia & R. R. R.*, 8 I. C. C. Rep. 531.

⁸⁵ *Blackman v. Southern Ry.*, 10 I. C. C. Rep. 352.

⁸⁶ *Heser Milling Co. v. St. Louis, A. & T. H. R. R.*, 3 Int. Com. Rep. 701, 5 I. C. C. 57.

⁸⁷ *Behrend v. Washington S. Ry.*, 9 I. C. C. Rep. 637.

⁸⁸ *Independent Refiners' Ass'n v. Western N. Y. & P. R. R.*, 4 Int. Com. Rep. 162, 5 I. C. C. 415.

⁸⁹ *Penn. R. R. Co. v. International Coal Mining Co.*, 173 Fed. 1.

⁹⁰ *Western U. T. Co. v. Call Pub. Co.*, 44 Neb. 326, 62 N. W. 506, 48 Am. St. R. 729.

⁹¹ *Hines & Battle v. Wilmington & C. Ry.*, 95 N. C. 434.

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prohibiting all discrimination but only such as are unreasonably unequal.⁹² It would seem to be clear, therefore, on authority that in order to be obnoxious to the Act on the ground of discrimination, the services of the carrier with respect to which discrimination is alleged must be performed at practically the same time and place. If the two services are performed at substantially different times they cannot be compared. Thus a carrier is not compelled to give special excursion rates to one political convention because it has given them to a similar convention of another political party on another date.⁹³ The same thing is true if the services compared are performed in different parts of the country;⁹⁴ or in different directions.⁹⁵

§ 716. What circumstances can be considered.

A discrimination against a shipper is not justified because he has refused in the past to pay excessive charges.⁹⁶ Or because the goods are eventually destined to a point beyond the original destination,⁹⁷ or because they came from a certain place.⁹⁸ So the magnitude of a shipper's enterprise, the number of persons for whom it produces employment and support, the developing results of its business upon the natural resources of the State, the impracticability of moving its plant to other localities, and the fact that it produces material largely used on railroads for construction or repair, do not entitle it to different consideration in respect to rates than individuals and small concerns should receive.⁹⁹ Nor will the private in-

⁹² *State v. Central Vt. Ry.*, 81 Vt. 463, 71 Atl. 494.

⁹³ *Cator v. Southern P. Co.*, 4 Int. Com. Rep. 397, 6 I. C. C. 113.

⁹⁴ *Allen v. Oregon Ry. & Nav. Co.*, 98 Fed. 16; *Central Yellow Pine Assoc. v. Illinois Cent. R. R.*, 10 I. C. C. Rep. 505; *Parks v. Cincinnati & M. V. R. R.*, 10 I. C. C. Rep. 47.

⁹⁵ *McLoon v. Boston & M. R. R.*, 9 I. C. C. Rep. 642; *Hewins v. New*

York, N. H. & H. R. R., 10 I. C. C. Rep. 221.

⁹⁶ *Phelps v. Texas & P. Ry.*, 4 Int. Com. Rep. 363, 6 I. C. C. 36.

⁹⁷ *Northwestern I. G. & S. S. Ass'n v. Chicago & N. W. Ry.*, 2 Int. Com. Rep. 431, 2 I. C. C. 604.

⁹⁸ *Hope Cotton Oil Co. v. Texas & P. Ry.*, 10 I. C. C. Rep. 696.

⁹⁹ *Colorado Fuel & I. Co. v. Southern P. Co.*, 6 I. C. C. Rep. 488.

terest of the carrier justify discrimination; thus the high relative classification of railroad ties, under the desire to keep them upon its own line and keep the price low for its own use, is unreasonable discrimination.¹ So an assurance by a carrier, that if one will locate in business on its line his property shall be taken for transportation as belonging to a specified class, cannot bind the carrier so as to compel a classification accordingly; a right to special rates cannot be made out in this way.² A higher charge when coal is loaded from wagon instead of from tipple, when the difference is not justified by any difference in cost to the carrier, is unlawful.³ On the other hand, circumstances, such as the accounting system of the United States, which really cause trouble or expense to the carrier may be considered.⁴ Other differences will render the services unlike; so where a passenger fails to buy a ticket, compelling him to pay excess fare is not an unlawful discrimination against him.⁵

§ 717. Differences in the conditions of service.

Although there will be found to be some difference of opinion as to the matters discussed in the sections immediately preceding, where the services performed are substantially identical, there is no difference of opinion as to the propriety of differences in rates where the services performed are essentially dissimilar.⁶ "We believe the true rule to be that rates must not only be reasonable in themselves, but must be relatively reasonable; that is, that a person or corporation engaged in public business,

¹ *Reynolds v. Western N. Y. & P. R. R.*, 1 Int. Com. Rep. 685, 1 I. C. C. 393.

² *Hurlburt v. Lake Shore & M. S. R. R.*, 2 Int. Com. Rep. 81, 2 I. C. C. 122.

³ *Glade Coal Co. v. Baltimore & O. R. R.*, 10 I. C. C. Rep. 226; *Thompson v. Pennsylvania R. R.*, 10 I. C. C. Rep. 640.

⁴ *United States v. Chicago & N. W. Ry.*, 127 Fed. 785, 62 C. C. A. 465.

⁵ *Sidman v. Richmond & D. R. R.*, 2 Int. Com. Rep. 766, 3 I. C. C. 512.

⁶ The quotation which follows is from *Irvine, C.*, in *Western U. T. Co. v. Call Pub. Co.*, 44 Neb. 326, 62 N. W. 506.

and obligated to render its services to all persons having occasion to avail themselves thereof, is bound in fixing its rates to observe two rules: First, its rates must be reasonable; and, second, it must not, without a just and reasonable ground for discrimination, render to one patron services at a less rate than it renders to another, where such discrimination operates to the disadvantage of that other.⁷ But it is not unjust discrimination—it is not contrary to the common law, and it is not contrary to our statute—to make a difference in rates where the expense or difficulty of performing the services renders such discrimination fair and reasonable.”⁸

§ 718. Proportionate differences may be made.

It follows from what has been said that differences may be made proportionate to the cost of service without the making of any illegal discrimination; indeed, in such cases it would be unreasonable not to make such differences upon that basis. In the leading case upon this point⁹ the general principle is thus stated: “In determining the duty of a common carrier, we must be reasonable and just. The carrier should be permitted to charge reasonable compensation for the goods transported. He should not, however, be permitted to unreasonably or unjustly discriminate against other individuals, to the injury of their business, where the conditions are equal. So far as is reasonable, all should be treated alike; but we are aware that absolute equality cannot in all cases be required, for circumstances and conditions may make it impossible or unjust to the carrier. The carrier may be able to carry freight over a

⁷ Citing *Hays v. Pennsylvania Co.*, 12 Fed. 300; *Messenger v. Railroad Co.*, 36 N. J. Law, 407, 13 Am. Rep. 457; *McDuffee v. Railroad Co.*, 52 N. H. 430, 13 Am. Rep. 72.

⁸ Citing *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 U. S. 263, 36 L. ed. 699, 12 Sup.

Ct. 844; *Root v. Railroad Co.*, 114 N. Y. 300, 21 N. E. 403, 4 L. R. A. 33; *Savitz v. Railway Co.*, 49 Ill. App. 315.

⁹ *Root v. Long I. R. R.*, 114 N. Y. 300, 21 N. E. 403, 4 L. R. A. 33, B. & W. 377.

long distance at a less sum than he could for a short distance. He may be able to carry a large quantity at a less rate than he could a smaller quantity. The facilities for loading and unloading may be different in different places, and the expenses may be greater in some places than in others. Numerous circumstances may intervene which bear upon the cost and expenses of transportation, and it is but just to the carrier that he be permitted to take these circumstances into consideration in determining the rate or amount of his compensation."¹⁰

§ 719. Rates should not be disproportionate.

It has already been explained at much length ¹¹ that the railway company may classify freights and passengers and charge different rates for the different classes, if there are reasonable grounds for such discrimination in the difference of the cost of service, risk of carriage or in the accommodations furnished, or the like; but the rates must be the same for all persons and goods of the same class or else there will be personal discrimination, plainly enough.¹² But it will also constitute personal discrimination if different classification is given to like goods without justification. As a general rule a railway company is justified in carrying goods for one person at a less rate than that at which it carries goods for another, only where there are circumstances which make the cost of carrying the former less than the cost of carrying the latter. And, moreover, to be exact the difference in the rates between the different

¹⁰ It is universally admitted that real differences in the cost of serving justify differences in rates; leading cases to this effect are: *Interstate Com. Com. v. B. & O. R. R.*, 145 U. S. 263, 36 L. ed. 699; *Western U. T. Co. v. Call Pub. Co.*, 181 U. S. 92, 45 L. ed. 765, 21 Sup. Ct. 561; *318½ Tons of Coal*, 14 Blatch. 453, Fed. Cas. 14,010, *Hays v. Pennsylvania Co.*, 12 Fed. 309; *Burlington,*

C. R. & N. Ry. v. N. W. Fuel Co., 31 Fed. 652.

¹¹ See *Cincinnati, H. & D. R. R. v. Interstate Commerce Commission*, 206 U. S. 142, 51 L. ed. 995, 27 Sup. Ct. 648.

¹² See *Interstate Commerce Commission v. Chicago Gt. Western Ry.*, 209 U. S. 108, 52 L. ed. 705, 28 Sup. Ct. 815.

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classifications of like articles must be proportionate to this difference in cost to the carrier of performing the service.

Topic B. Shipment in more Convenient Units

§ 720. Differences in the character of the service.

That there are differences in the cost of service by reason of ways in which traffic is handled must be recognized; and in so far as these economies in conducting the transportation are real a proportionate reduction may be made to the shipper in question. The various phases of this problem are well set forth in the opinion of Judge Baxter, elsewhere discussed more fully.¹³ "For the same reason passengers may be divided into different classes, and the price regulated in accordance with the accommodations furnished to each, because it costs less to carry an emigrant, with the accommodations furnished to that class, than it does to carry an occupant of a palace car. And for a like reason an inferior class of freight may be carried at a less rate than first-class merchandise of greater value and requiring more labor, care, and responsibility in the handling."¹⁴

§ 721. Shipment in carloads.

The most obvious application of this rule is the relatively lower rates almost universally quoted for carload lots as compared with less than carload. Substantial reasons exist for making the rate lower per barrel in carload lots than in less than carload quantities. The cost of service is very considerably less in the case of shipments in car-

¹³ *Hays v. Pennsylvania Co.*, 12 Fed. 309, B. & W. 368.

¹⁴ More convenient units are recognized reasons for making lower rates; see the language in *Interstate Commerce Commission v. Baltimore & Ohio R. R.*, 145 U. S. 263, 36 L. ed. 699, 12 Sup. Ct. 844; *Savitz v. Ohio & M. Ry.*, 150 Ill. 206, 37 N. E. 235,

27 L. R. A. 626; *Cook v. Chicago, R. I. & Pac. Ry. Co.*, 81 Iowa, 551, 46 N. W. 749, 25 Am. St. Rep. 512, 9 L. R. A. 764; *Root v. Long Island R. R.*, 114 N. Y. 300, 21 N. E. 403, 11 Am. St. Rep. 643, 4 L. R. A. 331, B. & W. 377; *Scofield v. L. S. & M. S. R. R.*, 43 Ohio St. 571, 3 N. E. 907, 54 Am. Rep. 846.

load lots than in less than carload quantities. The shipment by the carload goes direct to destination. It is loaded by the shipper and is unloaded by the consignee. The freight in it does not stop at the way stations to be handled in parcels to different consignees along the line. Only one bill of lading is made. It requires but one entry upon the waybill. The time occupied in transporting it to destination is far less than in the case of a shipment in less than carload quantities. There is but one collection of charges for freight.¹⁵ Where the shipment is made in less than carload quantities a separate receipt or bill of lading has to be given to every shipper for his parcel. A separate entry of every item has to be made on the waybill. The shipment is by a local freight train which stops at every station for which there is a package of freight. The freight has to be taken out in parcels and delivered at each of these stations. The freight is loaded and unloaded by the railroad company. There are as many collections of charges for freight as there are different parcels. The time occupied in transporting it is usually from two to three times as long as in the case of a carload shipment—according to distance. It occupies a whole car, and for the vacant space in that car the company is receiving no compensation.¹⁶

§ 722. Advantages of carload traffic.

The economies of handling freight in carload lots can

¹⁵ It has been doubted whether at common law the carrier need make carload rates unless it chooses. *Railroad Commissioners v. Weld*, 96 Tex. 394, 73 S. W. 529.

If, however, carload rates are granted, all shippers may demand the same terms. *New York T. & M. R. R. v. Gallagher*, 79 Tex. 685, 15 S. W. 694.

¹⁶ The Commission has power to pass upon the relation between carload and less-than-carload rates in

determining the property of ratings established by the carrier. *Cincinnati H. & D. R. R. v. Interstate Commerce Commission*, 206 U. S. 142, 51 L. ed. 995, 27 Sup. Ct. 648.

The Commission may now, since the recent amendments to the Act, establish carload rates when it thinks traffic conditions require them and fix the differential between such C. L. rates and L. C. L. *Atchison, T. & S. F. Ry. v. United States*, 232 U. S. 199, 34 Sup. Ct. 291.

hardly be overestimated.¹⁷ It has been held not unreasonable to make the rate per 100 pounds upon refined oil in less than carload lots 100 per cent greater than the rate upon carload lots. This situation was discussed in a broad way by the Commission in an early case.¹⁸ "The greater part of the supplies consumed upon the Pacific Coast originate twenty-five hundred miles from the point of consumption, and these supplies should be transported that twenty-five hundred miles in the cheapest manner. Waste is always expensive; if the railways are required to carry this merchandise in an extravagant manner that extravagance is finally borne by the public. We have seen that the actual cost of handling this traffic in less than carloads is 50 per cent greater than the cost of handling carloads. It seems probable, therefore, that the cheapest way in which these supplies can be taken across the continent and distributed to the consumer is by transporting them in solid carloads from the factory to the warehouse upon the Pacific Coast, and thence distributing to the retailer in less than carloads, although the effect of this may be somewhat diminished by the back haul from the wholesaler to the interior point which is not performed to the same extent where goods are sent across the continent in less than carload shipments directly to the store of the retailer. It would in our opinion be unfortunate from an economic standpoint to establish a condition which would require distribution entirely or mainly in less than carload lots from the middle west."

§ 723. Permission to mix carloads.

Upon the principles just discussed it would seem to be permissible for the carrier to allow the shipper to send forward a mixed carload of various products since the cost of handling a mixed carload from one consignor to one consignee is not materially different from the cost of

¹⁷ *Scotfield v. Lake Shore & M. S. Ry.*, 2 Int. Com. Rep. 67.

¹⁸ *Business Men's L. v. Atchison, T. & S. F. Ry.*, 9 I. C. C. 318.

handling a carload of one commodity. But the subject has its difficulties, and the carrier is not obliged to grant this privilege. In pointing this out the Commission said: ¹⁹ "With regard to the question of allowing the same rate on mixed carloads which is given to carloads of a single product, it may be remarked that it is almost inextricably involved in the question of the rate. A rule which might work well when the load was composed of articles bearing the same rate would be very difficult to formulate where the different articles took differing rates. The questions, which rates should govern, whether the highest or lowest, whether the proportion of different articles should influence the carload rate, whether the mixed rate should follow the highest or lowest class rate,—would all be involved, and it would probably be found difficult to formulate an equitable rule which should fix the rate upon such a load." ²⁰

§ 724. Lower rates for shipments in bulk.

That there are often certain advantages to the carrier in shipments in bulk in car lots over shipments in packages in car lots cannot be denied.²¹ It is upon this basis that it is cheaper to handle the traffic that the railroads have felt justified in giving a lower rate per ton-mile to those who ship oil in bulk in tank cars in comparison with those who ship oil in barrels in car lots. It is urged in behalf of the right of the railroads to make such differences in the rates that the different circumstances and conditions about these two modes of carrying oil fully justify these differences in the rates, viz.: the carrier furnishes the car for transporting the barrel oil, while the shipper usually supplies car and tank for carriage of tank oil, and that at a less charge for mileage than actual cost

¹⁹ *Schumacher Milling Co. v. Chicago, R. I. & P. R. R.*, 6 I. C. C. Rep. 61.

²⁰ See *Roth v. T. & P. Ry.*, 9 I. C. C. 602.

²¹ See *Pennsylvania Refining Co. v. Western N. Y. & P. R. R.*, 208 U. S. 208, 52 L. ed. 456, 28 Sup. Ct. 268.

of maintenance of the car; injury to the cars used for barrel oil unfitting them for general use; larger return-empty haul on box cars used for barrel oil than on tank cars; greater risk of such goods in transit and in depot, as well as greater danger to other freights in same train and in same depot in the case of barrel oil over that of tank oil, greater cost of service in loading and unloading barrel oil to and from the cars by the carrier, when tank oil is invariably loaded and unloaded by the shipper; inability of carrier to secure insurance on cars used for transporting barreled oil, while shipper of tank oil furnishes the car and assumes all risks.²² Such differences in the cost of the service should, it would seem, justify a carrier in making reasonable differences in its rates.

§ 725. Shipments in trainloads problematical.

It is urged with considerable force that a railroad is justified under the rules that are now under discussion in giving a lower rate for a trainload consigned from one shipping point to one point of delivery, since it cannot be denied that there is at least a slight difference in the cost of handling the traffic in trainloads. But such concessions are dangerous, as it would tend to concentrate the business of the country into very few hands if a lower rate could be given to the great operator who could ship in train lots. At all events the Interstate Commerce Commission set itself against such special rates for train loads in *Paine Bros. & Co. v. Lehigh Valley Railroad*.²³ "We perceive no sufficient reason for different rates on carload than on cargo or trainload shipments, whether the grain is carried for export or for domestic use. The principle involved in such a distinction violates the rule of equality and tends to defeat its just and wholesome purpose. That purpose is not fully accomplished if one scale of charges is

²² See *Scotfield v. Lake S. & M. S. Ry.*, 2 Int. Com. Rep. 67, 2 I. C. C. Rep. 90.

²³ 7 I. C. C. Rep. 218.

applied to cargo shipments and a higher rate is imposed for single carloads, even though all cargo shippers pay the same and all carload shippers are charged alike."²⁴ However, in several cases the bearing upon rates of trainload movements is discussed.²⁵ In establishing ratings it is considered whether the hauling of certain goods in trainloads is the exception or the rule.²⁶ It has distinct weight in the rating of the commodity if the traffic moves in trainloads.²⁷ That traffic moves in trainload lots from one point, and in smaller lots from another point, was considered by the Commission in determining the relative reasonableness of rates.²⁸ But in certain other cases where the point was urged, the trainloading was not considered.²⁹ And as to the matter of special rates to shippers of carload quantities, the Commission is as clear to-day as ever that whatever may be cost of service, giving greater consideration to trainload than to carload traffic would be to prejudice of small shipper and the public.³⁰

§ 726. Contracts for regular shipments.

In some English cases concessions are permitted to shippers who agree to make regular shipments. The leading case for this is *Nicholson v. Great Western Railway Company*,³¹ where the court refused to restrain the company from giving lower rates to the Ruabon Coal Company than were given to the complainant in the shipment of coal, it appearing that there was a contract between the railroad company and the Ruabon Coal Company, whereby the coal company undertook to ship, for a period of 10 years, as much coal for a distance of at least

²⁴ *Carstens Packing Co. v. O. S. L. R. R.*, 17 I. C. C. 324, *accord*.

²⁵ *Taylor v. N. & W. Ry.*, 25 I. C. C. 613.

²⁶ *Traffic Bureau of Nashville v. L. & N. R. R.*, 28 I. C. C. 533.

²⁷ *R. R. Com'rs of Fla. v. S. Exp. Co.*, 28 I. C. C. 634.

²⁸ *Wharton Steel Co. v. D., L. & W. R. R.*, 25 I. C. C. 303.

²⁹ *Richards v. Atlantic C. L. Ry.*, 23 I. C. C. 239.

³⁰ *Anaconda Copper Mining Co. v. C. & E. R. R.*, 19 I. C. C. 592.

³¹ 5 C. B. (N. S.) 366.

100 miles over defendant's road as would produce an annual gross revenue of £40,000 to the railroad company, in fully loaded trains, at the rate of seven trains per week. But this case is much limited in later cases. Thus an agreement with certain quarry owners to carry slate for a fixed number of years at a less rate than charged for the same service to complainant quarry owners, who refused to bind themselves by such an agreement, held an undue preference.³² And a difference in rates on an agreement for a period of thirty years and another agreement for fourteen years for a similar service is an undue preference.³³

§ 727. Units in passenger service.

It has already been indicated that the unit principle is applicable to passenger service. Thus a lower rate for a limited ticket than for an unlimited ticket may be justified, since there will be more bother if the transportation is broken into several separate services by stop-overs instead of being taken as a whole.³⁴ A lower rate may be made to those who buy their tickets in lots instead of for the single trip, such as strip tickets and mileage tickets. And it has been held that a railroad may make a lower rate than twenty fares to twenty people traveling together under one transportation contract. But another case probably states a general principle in its pertinent dictum that a railroad is not obliged to sell commutation tickets if it chooses not to; but if it does, any traveler may demand it. Here again the necessity for establishing separate units is not sufficiently plain to imperatively demand recognition; if not, indeed, distinctly considerable, a com-

³² *Diphwys Casson Slate Co. v. Festiniog R.*, 2 Nev. & Mac. 73. U. S. 263, 36 L. ed. 699, 12 Sup. Ct. 844.

³³ *Holland v. Festiniog R. Co.*, 2 Nev. & Mac. 278.

³⁴ *Edson v. So. Pacific Ry. Co.*, 144 Cal. 182, 77 Pac. 894. See also *Interstate Commerce Commission v. Baltimore & O. R. R. Co.*, 145

If it were not for the provisions of section 22, it is debatable whether the concession from the regular fare would be lawful. In *re Mileage Books*, 28 I. C. C. 318.

pany is not irrational which ignores it. Moreover, it seems to be well established that if the regulating authority attempts to order the issuance of mileages, for example, its interference will be held to be outrageously vexatious.³⁵

§ 728. The basis of the differential.

In a recent case in the United States Supreme Court ³⁶ not only the question of the relation of the carload rates to less than carload rates, but also the relation of less than carload rates to each other was thus elaborately dealt with. "The question presented is not one involving only the proper relation of soap in less than carload lots, to soap in carload lots, but also its proper relation to other articles in less than carload lots. Freight is carried either in carload lots, or in less than carload lots. This division of freight necessarily attends transportation by rail. Classification, within the meaning of the Act to Regulate Commerce, relates to these divisions separately. The classification of soap in less than carload lots, is not controlled by the classification of soap in carload lots, nor is the reclassification of soap in less than carload lots controlled by the relation it bears to other articles in less than carload lots,—that relation is to be determined by the degree in which, in comparison with such other articles, its handling and carrying is, or may be, affected by the cost of the service, competitive and commercial conditions, volume, density, distance, value, and risk of loss or damage. It is true that these elements must also be considered in determining the classification of articles in carload lots, but from a different standpoint. A given article of traffic

³⁵ *State ex rel. v. Delaware, L. & W. Ry. Co.*, 48 N. J. L. 55, 2 Atl. 803. See also *Lake Shore & M. S. Ry. Co. v. Smith*, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. 565.

Special fares for movement of passengers in guaranteed numbers in one day, without baggage-checking

privileges, may be provided by carriers under section 22, but in absence of discrimination Commission no power to prescribe. *Carnegie Board of Trade v. P. Co.*, 28 I. C. C. 123.

³⁶ *Cincinnati, H. & D. R. R. v. Interstate Com. Comm.*, 206 U. S. 142, 51 L. ed. 995, 27 Sup. Ct. 648.

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may be more or less desirable when shipped in less than carload lots, than when shipped in carload lots. Bulk, weight, form, manner of packing, etc., may materially affect the classification of different articles to be carried in the same car, when they might have little or no weight in the classification of a single article to be carried in carload lots." ³⁷

§ 729. Comparison of bulk and package rates.

So different are the conditions under which freight is carried in packages and in bulk that it is not proper to institute comparisons as to particular factors connected with each. As the United States Supreme Court ³⁸ said in a recent case: "Because circumstances existed which prevented the economical use of the tank car by plaintiffs (no demand being made for the use of a tank car) is no ground for finding discrimination in the charge for the weight of the barrel package (such charge being in itself not an unreasonable one), while none is made for the tank containing the oil." If, however, the railroad fails to provide tank cars for the use of its shippers it would be unfair discrimination to charge shippers of oil in packages for the additional weight. As the Supreme Court of Ohio ³⁹ said in the leading case on this point: "It must either provide tank cars for all of its customers alike, or give such rates of freight in barrel packages by the carload, as will place its customers using that method on an equal footing with its customers adopting the other method."

Topic C. Facilities Furnished by Shippers

§ 730. Terminal facilities furnished by shippers.

It is a principal rule in this matter that it is permissible

³⁷ Until recently the Interstate Commerce Commission had no power to fix a rate by insisting upon a certain classification. *Interstate Com. Comm. v. Lake Shore & M. S. Ry.*, 134 Fed. 942; sustained in 202 U. S. 613, 50 L. ed. 1171, 26 Sup. Ct. 776.

³⁸ *Pennsylvania Refining Co. v. Western N. Y. & P. R. R.*, 208 U. S. 208, 52 L. ed. 456, 28 Sup. Ct. 268.

³⁹ *State v. Cincinnati, N. O. & T. P. R. R. Co.*, 47 Oh. St. 130, 23 N. E. 928.

for a railroad to make a lower rate to a shipper who furnishes a part of the facilities which the carrier must otherwise provide in order to serve him. One of the leading cases in establishing this rule is undoubtedly *Root v. Long Island Railroad*; ⁴⁰ the essential facts appear in this extract from the opinion. "The facilities which Quintard was to provide for the loading of the coal, his services in loading the cars, the large quantities which he was to ship, in connection with the large sums of money that he had expended in the erection of the dock, in part for the use and accommodation of the defendant, are facts which tend to explain the provisions of the contract complained of, and render it a question of fact for the determination of the trial court as to whether or not the rebate, under the circumstances of this case, amounted to an unjust discrimination, to the injury and prejudice of others. Therefore, in this case, the question is one of fact, and not of law; and, inasmuch as the discrimination has not been found to be unjust or unreasonable, the judgment cannot be disturbed." ⁴¹

§ 731. Undue prejudice in granting allowances.

Under the Act as amended the Commission has been given charge of this situation. In one proceeding ⁴² it has held the provisions in the tariffs requiring a return to defendant of the car within forty-eight hours as a condition precedent to the payment of an allowance to be unreasonable and unduly discriminatory. ⁴³ Recently the Commission has said that allowances by a carrier to a salt com-

⁴⁰ 114 N. Y. 330, 21 N. E. 403, 11 Am. St. Rep. 643, 4 L. R. A. 33.

⁴¹ It is generally agreed that a reduction may be made to such shippers as furnish a part of the facilities necessary to serve them. See *Savitz v. Ohio & M. Ry.*, 150 Ill. 208, 27 N. E. 235, 27 L. R. A. 626, affirming 49 Ill. App. 315; *Scotfield v. Lake Shore & M. S. R. R.*, 43

Ohio St. 571, 3 N. E. 907, 54 Am. Rep. 846; *State v. Cincinnati, N. O. & T. P. Ry.*, 47 Ohio St. 130, 23 N. E. 928; *Brundred v. Rice*, 49 Ohio St. 640, 32 N. E. 169, 34 Am. St. Rep. 589.

⁴² *In re Restricted Rates*, 20 I. C. C. R. 426.

⁴³ *Nebraska-Iowa Grain Co. v. U. P. R. R.*, 15 I. C. C. 90.

pany for use of latter's docks and facilities in handling its shipments must be scrutinized.⁴⁴ And terminal arrangements involving privileges to special concerns have been repeatedly condemned by the courts.⁴⁵ As the authorities now have jurisdiction over allowances, they will not permit any unreasonable compensation for any service connected with transportation performed by the shipper or consignee.⁴⁶ Nor will the Commission permit any allowance to be made for services not owed by the carrier to the shipper or consignee, such as the loading or unloading of carload freight by special mechanisms or plant facilities.⁴⁷

§ 732. Unjustifiable differences in rates.

The difficulty in applying these principles to particular cases is, however, considerable. Unless the railroad offers both services to all shippers alike, so that any shipper is free to choose his method of shipment, discrimination will necessarily result in favor of those who ship at the lower rates in comparison with those who are compelled to pay the higher rates. In the oil business particularly, the complaints against the differences between tank rates and barrel rates have been both loud and long, and the problem has been brought before the Commission several times. In the earliest of these cases,⁴⁸ Commissioner Cooley pointed out that the argument justifying differentials although sound enough doubtless, abstractly, did not meet the actual conditions. "It is obvious, we think, from the facts stated, that instead of the defendants offering two modes of transportation which are open to the acceptance of all, they offer only one which is open. The other is offered on such terms that it can by possibility be

⁴⁴ *International Salt Co. v. G. & W. R. R.*, 20 I. C. C. 530. *R.*, 230 U. S. 248, 33 Sup. Ct. 916.

⁴⁵ *Tap Line Cases*, 234 U. S. 1, 34 Sup. Ct. 741.

⁴⁶ *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498, 31 Sup. Ct. 279.

⁴⁷ *Rice v. Louisville & Nashville Ry.*, 1 Int. Com. Rep. 722, 1 I. C. C. Rep. 503.

⁴⁸ *Mitchell Coal Co. v. Pa. R.*

accepted only by parties who can control a considerable capital, and who will supply for themselves an important part of the means of transportation, and also supply terminal facilities. The man of small means who adopts the method of transportation in barrels cannot be said to do so of choice when the failure of the carrier to supply for the other the customary means of transportation compels him to do so." *

§ 733. Concessions to shippers in bulk considered.

This complaint has been made to the Commission many times since this first case; and the shippers have in the successive decisions received increasing protection against discrimination of the railroads of the sort here described.⁵⁰ The Commission has insisted upon its policy that unless the railroads provide an adequate equipment of tank cars oil must be taken in barrels at the same rate as it would be taken in tank cars. And for the weight of the tank it is held that in assuming for transportation purposes that a barrel of refined petroleum oil weighs 400 pounds and that a gallon of that commodity weighs 6.3 pounds when shipped in tanks, the railroads were using constructive or hypothetical weights so much out of proportion to actual weights that positive and measurable preference was granted to the shipper by the tank method; and so far as that practice enabled the tank shipper to secure the carriage of more pounds of freight for the same money than the shipper in barrels it was an unlawful prejudice. As to another scheme of giving a reduction it was held that the practice of allowing the tank shipper an arbitrary deduction of 42 gallons per tank car is wholly indefensible, as losses from leakage and evaporation were not less proportionally when the shipment is made in barrels, and no circumstance was discovered or reason advanced which

* See Independent Refiners Ass'n v. W. N. Y. & P. R. R., 4 Int. Com. Rep. 63, 5 I. C. C. 415.

⁵⁰ Rice v. Louisville & N. R. R., 1 Int. Com. Rep. 722, 1 I. C. C. Rep. 503.

justified a concession of that nature to the shipper who furnishes his own conveyance, when no corresponding allowance was made to a rival shipper using the means of transportation provided by the carrier.⁵¹

§ 734. Railroad without tank cars.

This abuse came before the judicial courts for decision not long afterward, in the case of *State v. Cincinnati, New Orleans & Texas Pacific Railway Company*,⁵² where Mr. Justice Bradbury wrote a strong opinion against such discrimination, concluding with this sweeping language: "The duty of providing suitable facilities for its customers rests upon the railroad company; and if, instead of providing sufficient and suitable cars itself, this is done by certain of its customers, even for their own convenience, yet the cars thus provided are to be regarded as part of the equipment of the road. It being the duty of a railroad company to transport freight for all persons, indifferently, and in the order in which its transportation is applied for, it cannot be permitted to suffer freight cars to be placed upon its track by any customer for his private use, except upon the condition that, if it does not provide other cars sufficient to transport the freight of other customers in the order that application is made, they may be used for that purpose. Were this not so, a mode of discrimination fatal to all successful competition by small establishments and operators with larger and more opulent ones could be successfully adopted and practised at the will of the railroad company, and the favored shipper."⁵³

⁵¹ *Soofield v. Lake Shore & Michigan Southern R. R.*, 2 Int. Com. Rep. 67, 2 I. C. C. Rep. 90; *Re Rebate Tank & Barrel Rates*, 2 Int. Com. Rep. 245, 2 I. C. C. Rep. 365; *Rice v. Western N. Y. & Pa. Ry.*, 3 Int. Com. Rep. 162, 4 I. C. C. Rep. 131; *Rice, Robinson & Winthrop v. Western N. Y. & Pa. R. R.*, 2 I. C.

C. Rep. 389, s. c., 3 I. C. C. Rep. 87, s. c., 4 I. C. C. Rep. 131, s. c., 6 I. C. C. Rep. 455; *Rice v. Cincinnati, W. & B. R. R.*, 3 Int. Com. Rep. 841, 5 I. C. C. Rep. 193.

⁵² 47 Ohio St. 130, 23 N. E. 928.

⁵³ See also *Brundred v. Rice*, 49 Oh. St. 640, 32 N. E. 169, 34 Am. St. Rep. 589.

§§ 735, 736] RAILROAD RATE REGULATION

§ 735. Transportation expenses paid by shipper.

Whatever is done by the shipper which directly reduces to the railroad company the cost of serving him may be allowed for in the rate made to him without causing discrimination. One of the plainest cases of this sort before the Commission is *Castle v. Baltimore & Ohio Railroad Company*,⁵⁴ where complainant alleged that defendant had unjustly discriminated in rates and facilities for the transportation of sand against him and in favor of his competitors. Discussing the essential facts, the Commission said: "The only remaining point, and by far the most important one raised by this issue, is that involved in the alleged discriminations in favor of Brown, the complainant's competitor at Dock Siding. Brown, it appears, owned and at times leased other cars and equipment, paid the trainmen, conductors, and necessary telegraph operators, and relieved the defendant from all liability from either loss or damage to rolling stock or injury to employees; in consideration of which the defendant charged him for track service only. The complainant owned neither cars nor equipment, and when shipping in the defendant's cars was charged the published rate."⁵⁵

§ 736. Rental paid on shipper's cars.

If the shipper provides his own cars the railroad, it would seem clear, may allow him a reduction in his freight rate, equal to the rental value of his cars at all events. It is properly the business of the railway companies, to be sure, to supply cars for their customers; but if they stand ready to do this, they may, nevertheless, at their option make an allowance to the shipper who furnishes his own cars, which is not disproportionate to the reduced cost of serving him. Even in the extreme case of *State v. Cincinnati, New Orleans & Texas Pacific Railroad Company*,⁵⁶

⁵⁴ 8 Int. Com. Rep. 333.

⁵⁵ See *Chicago & A. R. R. Co. v. Chicago V. & W. Coal Co.*, 79 Ill. 121, where a shipper furnishing the

rolling stock was given an unusual concession from regular rates.

⁵⁶ 47 Ohio St. 130, 23 N. E. 928.

which is most opposed to special arrangements of this sort, this is grudgingly admitted. "No doubt, a shipper who owns cars may be paid a reasonable compensation for their use, so that the compensation is not made a cover for discriminating rates, or other advantages to such owner as a shipper. Nor is there any valid objection to such owner using them exclusively, as long as the carrier provides equal accommodations to its other customers. It may be claimed that if a railroad company permit all shippers, indifferently and upon equal terms, to provide cars suitable for their business, and to use them exclusively, no discrimination is made. This may be theoretically true, but is not so in its application to the actual state of the business of the country; for a very large proportion of the customers of a railroad have not a volume of business large enough to warrant equipping themselves with cars, and might be put at a ruinous disadvantage in the attempt to compete with more extensive establishments. Aside from this, however, a shipper is not bound to provide a car."⁵⁷

§ 737. Allowance for cars or facilities furnished.

When the shipper furnishes cars or other facilities the carrier may lawfully make an allowance on that account, provided the allowance is reasonable in amount; an unreasonable allowance under color of compensation for facilities so furnished would constitute an illegal rebate. So a reasonable allowance to an elevator company for elevator service is not an illegal rebate, though the elevator company as a shipper of grain is thereby incidentally aided in its business.⁵⁸ So the allowance of mileage for tank cars furnished by shippers, and low return rates on oil returned in the cars, is not illegal unless the mileage is excessive.⁵⁹

⁵⁷ See also *Brundred v. Rice*, 49 Ohio St. 640, 32 N. E. 169, 34 Am. St. Rep. 589.

⁵⁸ *Rice v. Cincinnati, W. & B. R. R.*, 3 Int. Com. Rep. 841, 5 I. C. C. 193.

⁵⁹ *Matter of Allowance to Elevators*, 10 I. C. C. Rep. 309.

But when the allowance is unreasonable it constitutes an illegal rebate.⁶⁰ Each case involving an allowance must be determined upon the special facts and circumstances presented.⁶¹ This matter of allowances is one which has received much attention from the Commission of late years; for by section 15 of the Act as amended it is authorized to limit the amount that the carrier may pay to the shipper for transportation services rendered by latter.⁶² But the provision clearly recognizes that a just and reasonable allowance may be made to the owner of property transported when such owner renders a service connected with or furnishes an instrumentality used in the transportation.⁶³ A memorandum of two recent cases of the Supreme Court among others lately there decided, will serve to make this matter clear. In one of them it was held that elevation is made such a part of transportation as to bring it within the jurisdiction of the Interstate Commerce Commission, which is authorized to determine what is a reasonable allowance to a shipper who is also an elevator man for elevation services rendered in connection with transportation.⁶⁴ In the other it was decided that when, under the through rate to New York, delivery is undertaken within lighterage limits published in the schedule, an allowance to the extent that is deemed proper may be made to receivers furnishing their own lighterage and terminals therefor.⁶⁵

Topic D. Restriction to Scheduled Allowance

§ 738. Extent of statutory restrictions.

Section 1 imposes on the carrier the duty to provide and

⁶⁰ *Shamberg v. Delaware, L. & W. Ry.*, 3 Int. Com. Rep. 502, 4 I. C. C. 630.

⁶¹ *Merchants Dispatch Storage Co. v. I. C. R. R. Co.*, 17 I. C. C. 98.

⁶² *Industrial Lumber Co. v. St. L. W. & G. Ry. Co.*, 19 I. C. C. 50.

⁶³ *Sterling & Son Co. v. M. C. R. R. Co.*, 21 I. C. C. 451.

⁶⁴ *U. P. R. R. Co. v. Updike Grain Co.*, 222 U. S. 215, 56 L. ed. 171, 32 Sup. Ct. 39.

⁶⁵ *United States v. B. & O. R. R.*, 231 U. S. 274, 34 Sup. Ct. 75.

furnish certain services in relation to the transportation of property at reasonable charges.⁶⁶ Allowances, therefore, when these services are furnished by patrons under section 15 must not be above the reasonable cost of service, and thereby become indirectly a rebate.⁶⁷ The refusal of a carrier to pay an allowance in a matter for which it had no tariff authority is, therefore, not in violation of the Act.⁶⁸ An allowance in the form of additional free time may be just as unlawful as one in the form of money.⁶⁹ At the present time carriers very generally pay three-fourths of a cent a car mile on both loaded and empty movements.⁷⁰ It will always be a question nowadays whether the net earning on cars as a result of such payments constitute more than a just return upon the value of those cars.⁷¹ But the principle is that whatever allowances are made must be just, reasonable and non-discriminatory.⁷² Whatever charges are made, whatever services are performed, and whatever privileges are allowed by carriers, must be stated separately in the schedules filed with the Commission.⁷³ A common carrier by contract may not impose upon itself any burden or grant any privilege, or perform any service, or make any allowance with respect to the traffic of a particular shipper, except under the authority of its published tariffs.⁷⁴ And even so, this can be done only when the burden is assumed, or the privilege granted, or allowance made to all shippers under like circumstances and similar conditions.⁷⁵ There being no obligation to make such allowances, a complaint asking establishment of

⁶⁶ Transit Case, 24 I. C. C. 340.

⁶⁷ Mfrs. Ry. Co. v. St. L., I. M. & S. Ry., 28 I. C. C. 93.

⁶⁸ Rylet v. W. R. R., 25 I. C. C. 210.

⁶⁹ Alan Wood, Iron & Steel Co. v. P. R. R., 24 I. C. C. 27.

⁷⁰ Rates on Linseed Oil, 26 I. C. C. 265.

⁷¹ In re Advances on Potatoes, 25 I. C. C. 159.

⁷² Suffern Grain Co. v. B. & O. R. R., 20 I. C. C. 200.

⁷³ Brook-Rauch Mill & Elevator Co. v. M. P. Ry., 17 I. C. C. 158.

⁷⁴ Anderson, Clayton & Co. v. C., R. I. & P. Ry., 18 I. C. C. 340.

⁷⁵ General Electric Co. v. N. Y. C. & H. R. R. R., 14 I. C. C. 237.

tariff provisions for reimbursement of shippers for repair made on cars was dismissed.⁷⁶

§ 739. Both rates must be open to all.

The modern fear of discrimination is such that it is not open to a company to make concessions to one customer who is asking a cheaper service without at the same time giving other customers the right to get the lower rate by conforming with the conditions under which it is offered. Thus in one recent successful prosecution by the government for giving or taking a rebate the gravamen of the charge was not that the allowance of \$1.00 per car for the terminal facilities furnished by the guilty shipper was improper in itself, but that the railroad had not properly announced such allowances in its published schedules.⁷⁷ Still more open to condemnation is a contract between a particular shipper and a railroad company, whereby the railroad was to allow ten per cent off all freight bills rendered, to recoup a shipper who had built a hoist to load his ties upon a siding, for such an arrangement is necessarily exclusive.⁷⁸ It has been said by the Commission that equality of opportunity in the use of transportation facilities is one of the purposes of the Act.⁷⁹ It should be remembered that allowances are subject to abuses in shape of rebates, and they must therefore be strictly scrutinized.⁸⁰ Discrimination would result from granting lower rate to large shipper providing facilities for prompt unloading than accorded smaller competitor unable to provide such facilities.⁸¹ A proposed rate was recently opposed, because it would discriminate in favor of one shipper who built tank facilities in which to receive his shipments.⁸²

⁷⁶ *Balfour, Guthrie & Co. v. O. W. R. R. & N. Co.*, 21 I. C. C. 539.

⁸⁰ *Southwestern Missouri Millers' Club v. St. L. & S. F. R. R.*, 26 I. C. C. 245.

⁷⁷ *United States v. C. & A. Ry.*, 148 Fed. 646.

⁸¹ *In re Restricted Rates*, 20 I. C. C. R. 426.

⁷⁸ *Chesapeake & O. Ry. v. Standard Lumber Co.*, 174 Fed. 107.

⁸² *Molasses Rates from Mobile*, 23 I. C. C. 666.

⁷⁹ *In re Wharfage Charges at Galveston*, 23 I. C. C. R. 535.

§ 740. Lighterage allowance.

Discrimination would result from the payment of a lighterage allowance to one shipper while refusing such allowance to another shipper performing that service.⁸³ The Commission has jurisdiction under section 15 of the Act to inquire into the lawfulness of allowances made by carriers to shippers for the alleged transfer by the latter from their refineries or warehouses to the cars of defendants.⁸⁴ Loose allowances paid to shippers "in lieu of lighterage and floatage" may be questioned.⁸⁵ But there is no ground for criticising the withholding of lighterage privilege and allowance from the complainant where its sugar crosses lighterage limits, while according such a privilege and allowance to another shipper within lighterage limits.⁸⁶ It should be noted that by this doctrine which has finally prevailed, lighterage within a zone of delivery covered by the rate scheduled is treated as part of the transportation service undertaken by the carrier, for aiding in the performance of which shippers with whom agreement is made may be given an allowance subject to its being found unreasonable by the Commission under section 15. Under these conditions such services are not regarded as merely accessorial to transportation, payment for which would be considered as forbidden by the Act unless accorded to all under the same conditions.

§ 741. Elevation charges.

While the Commission believes that the payment of all elevation allowances and the giving of all free elevation should be prohibited, it fully accepts the United States Supreme Court decision holding that elevation allowances may be made.⁸⁷ Considering the Elevator Allowances

⁸³ Federal Sugar Refining Co. v. B. & O. R. R. Co., 20 I. C. C. 200.

⁸⁴ In re Allowances for Transfer of Sugar, 14 I. C. C. 619.

⁸⁵ Chamber of Commerce of New York v. N. Y. C. & H. R. R. R. Co., 24 I. C. C. 55.

⁸⁶ United States v. Baltimore & O. R. R., 231 U. S. 274, 34 Sup. Ct. 75.

⁸⁷ The current doctrines of the Commission may be seen in: In re Elevation Allowances, 24 I. C. C. 197, and Traffic Bureau of St. Louis

cases of Supreme Court together, the Commission has concluded that it was intention of Supreme Court to hold that whatever might be the case, if railroad saw fit to confine its payment to elevation actually required in transportation of grain, it must, when it makes this allowance to one elevator under such circumstances as to give that elevator payment for commercial elevation, extend the same privilege to all other elevators similarly situated.⁸⁸ The Commission holds that a railroad should cease from paying any allowance for terminal services to elevator, unless tariffs shall at the same time offer such allowance to all other shippers using the elevators in the city.⁸⁹ But an allowance made to a shipper of grain furnishing elevation service under an arrangement with a carrier, is regarded by it a rebate and an unlawful discrimination only when it involves a profit over and above the actual cost of service.⁹⁰

§ 742. Transit privileges.

The Commission has held that carriers may grant the privilege of concentration and protect through rates relating thereto;⁹¹ for concentrating rates by increasing the size and regularity of shipments seem to be of advantage to carriers as well as shippers.⁹² Lack of proper policing at a transit point is a matter that ought to be investigated and corrected.⁹³ Compression is a service which the

v. C., B. & Q. R. R., 22 I. C. C. 496.

⁸⁸ See *Peavey & Co. v. Union Pacific Ry.*, 222 U. S. 42, 56 L. ed. 83, 32 Sup. Ct. 1, and *Union Pacific Ry. v. Updike Grain Co.*, 222 U. S. 215, 56 L. ed. 171, 32 Sup. Ct. 39, which have made the long course of opinion in the Commission previous to that time more or less obsolete.

⁸⁹ In *re Keystone Elevator Co.*, 25 I. C. C. 618; see also *Gund & Co. v. C., B. & Q. R. R.*, 25 I. C. C. 326.

⁹⁰ *Re Allowances to Elevators by U. P. R. R.*, 12 I. C. C. 85; see also *Riley v. Wabash R. R.*, 25 I. C. C. 210.

⁹¹ *Anderson, Clayton & Co. v. C., R. I. & P. Ry.*, 18 I. C. C. 340.

⁹² *Railroad Commission of Wisconsin v. C. & N. W. Ry.*, 16 I. C. C. 85.

⁹³ *Indianapolis Freight Bureau v. C., C., C. & St. L. Ry.*, 26 I. C. C. 53.

carrier procures for its own convenience, and when that service is performed in such manner as not to prejudice or prefer a particular shipper or community, the Act does not limit the freedom of the carrier to make contracts in respect thereto.⁶⁴ In other words, what is forbidden by the Act are payments which inure to the benefit of a shipper whereby his transportation costs him less net than what other shippers, his competitors, are paying. In dealing with a shipper if payments are made for anything pertaining to the transportation the transaction is subject to the closest scrutiny to determine whether more than a fair price is passing hands.

§ 743. Terminal allowances.

It has been seen that the ownership by a shipper of a rail line which serves that shipper calls for the closest scrutiny to ascertain whether, through divisions or allowances, rebates are made to the shipping owner.⁶⁵ If it be shown that under the practice prevailing the line carrier owed no duty to move cars about complainant's yard it follows that the complainant was not entitled to recover for the services performed and the instrumentalities furnished by it in connection with the movement of cars in its yard.⁶⁶ And if a switching service is included within the transportation undertaken at the rate scheduled, an undue disadvantage for which damage will be awarded will be held to result from the carrier's failure to accord terminal switching allowance to complainant, while granting such allowances to competing industries performing similar services.⁶⁷ And if the relation between the tap line and the main carrier is that of connecting railroads, whenever an abnormal division is allowed to an industrial railroad there results an indirect rebate to the shipping

⁶⁴ *Merchants Cotton Press & Storage Co. v. I. C. R. R.*, 17 I. C. C. 98.

⁶⁵ *Crane R. R. Co. v. P. & R. Ry.*, 15 I. C. C. 248.

⁶⁶ *Solvay Process Co. v. D., L. & W. R. R.*, 14 I. C. C. 246.

⁶⁷ *Buffalo Union Furnace Co. v. L. S. & M. Ry.*, 21 I. C. C. 620.

industry of its ownership of the tap line.⁸ In the latter part of Chapter IV these possibilities of the relation of industrial trackage to the line carrier were discussed,⁹ and it was found that it might be that of a plant facility, a tap line, a connecting carrier and what was still more difficult to deal with, a combination of these complications.¹

§ 744. Allowances for facilities closely scrutinized.

With the rigorous enforcement of the law against all discrimination in late years, such arrangements as have been just described are being questioned, if not as amounting to discrimination in themselves, at least as a cover for discrimination. At all events, the whole facts will be gone into to discover whether too advantageous terms are being obtained. Thus in a recent case it was discovered that a car company was getting so much for the use of its cars that the reduction was being made the basis for reduced rates to those who shipped in those cars.² And in another case not charging certain shippers demurrage for cars, upon an apparently private siding found to be public, while others paid demurrage in regular yards, was held plain discrimination.³ However, the railroads are still allowed to make arrangements with customers furnishing

⁸ In re Divisions of Joint Rates on Coal, 22 I. C. C. 51.

⁹ See Tap Line Cases, 234 U. S. 29, 34 Sup. Ct. 41.

¹ See Interstate Commerce Commission v. Atchison, T. & S. F. Ry., 234 U. S. 294, 34 Sup. Ct. 291.

² Interstate Commerce Commission v. Reichman, 145 Fed. 235.

To pay an allowance to one shipper while refusing to permit all shippers to take advantage of the privilege, unless justifying circumstances and conditions are shown, creates unjustifiable preference within the pro-

hibition of the Act. Southwestern Mo. M. C. v. St. L. & S. F., 26 I. C. C. 245.

³ Ohio Coal Co. v. Whitcomb, 123 Fed. 359.

The Commission has consistently held to the doctrine that whatever allowances are made to shippers in return for services performed in connection with transportation must be just and reasonable in view of the cost of the service tendered, held free from discrimination and preference, in regard to others similarly situated. Sufferin Grain Co. v. I. C. R. R., 22 I. C. C. 178.

their own facilities. Some difficulty is inseparable from this situation, but probably not enough to justify the radical remedy of forbidding such arrangements altogether. Those who get allowances which are not scheduled will, however, fall foul of the modern statutes against discriminations, even if the allowance made is proper enough in itself. Moreover, when the arrangement is in its nature an exclusive one, of which other patrons cannot take advantage, it would generally be condemned.

§ 745. Allowances for facilities still permissible.

It is not, however, considered by the courts to be desirable that there should be no way to give a proper allowance to shippers who employ their own property and devote their own labor to some of the work that the carrier must otherwise do for them. In one of the important Federal cases,⁴ this is insisted upon in setting aside a ruling of the Commission that no allowance should be made elevator men who deal with their own grain in their own elevators. "Pecuniary advantages derived by shippers from the ownership or use of such facilities of trade are attributable to that ownership, and not to the transportation of the articles shipped, and the consideration and regulation of these advantages are without the scope of the Commission's power. The truth is that trade advantages of this nature do not condition the question of reasonableness of rates, or rebates, or of discrimination. The shipper who owns warehouses, tipples, spur tracks, cars, mills, and by their use derives greater profit from the dealing in the articles which he ships over a railroad, is entitled to the same rate of charge for transportation and the same reasonable compensation for transportation services which

⁴ *Peavey & Co. v. Union Pac. R. Co.*, 176 Fed. 409.

If \$6 is a reasonable allowance to consignors at New Orleans for loading cars with bananas, it would seem

prima facie that \$10 per car allowance for loading at Galveston was too high. Rates on Bananas from Gulf Ports, 30 I. C. C. 510.

he renders that the shipper who owns less or no such trade facilities and derived less profit is entitled to." ⁵

⁵ Citing Harp v. Choctaw, O. & G. Ry. Co., 125 Fed. 445, 61 C. C. A. 406.

If elevation is not a transportation necessity at East St. Louis, the

withdrawal of the allowance is justified, although still given at certain other points. Elevation Allowances at St. Louis, 30 I. C. C. 696.

CHAPTER XVI

DISCRIMINATION BETWEEN LOCALITIES

- § 750. Provisions of the Act.
- 751. Scope of its principles.

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- 753. Statutory regulation of discrimination between localities.
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- § 803. Substantial differences of condition which justify discrimination.
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- 809. No obligation to make preferential rates.

§ 750. Provisions of the Act.

There are two clauses in the Act dealing with discrimination between localities, one general and the other specific. By the first paragraph of section 3 it is declared unlawful for any common carrier subject to the provisions of the Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description

of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. By the general clauses of section 4 as recently amended, it is made unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through route than the aggregate of the intermediate rates subject to the provisions of this Act; but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for a longer distance: *Provided, however,* That upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section.

§ 751. Scope of its principles.

The object of the provisions of the Act, in so far as it relates to discrimination between localities, is to insure so far as possible that localities which are similarly situated shall receive equal treatment at the hands of the carrier. The Act recognizes, however, that absolute equality is unattainable, and that some discrimination may be allowed, provided it is not undue. Whether any discrimination exists and whether it is undue are questions of fact, and the burden is on the carrier to justify itself. Under the third section considerable freedom of action is left to

the carrier so long as it keeps within reasonable limits, but the fourth section sets up a rigid rule that the rate for a long haul shall never be less than for a short haul included therein, unless the question has first been presented to the Commission and its approval of a departure from the rule obtained. In the original form of the Act, the carrier was forbidden to discriminate in favor of the long haul when made "under substantially similar circumstance and conditions." This qualification made it possible for the carrier to determine for itself as a primary question of fact whether or not dissimilar circumstances justifying a difference in rates existed, thus making it impossible for the Commission to pass upon it until an application to set aside the rate had been made to it by a carrier. This virtually nullified the section, and accordingly it was amended in 1910 by the omission of the words "under substantially similar circumstances and conditions." Under the Act as it now stands, it is for the Commission and not the carrier to make the primary decision as to whether a difference in conditions justifying a difference in rate exists. Applications for relief are numerous, and in general whatever is recognized as a dissimilarity of circumstances and conditions justifying discrimination under section 3 will be accepted by the Commission as a sufficient excuse for relief from section 4. Such appeals are most frequently based on the alleged existence of competition which the carrier must meet in order to participate in the traffic of a given point. This allegation is so easily made and the competition may so easily be either nominal or factitious that the Commission carefully scrutinizes the facts for the purpose of ascertaining whether the competition is real, whether it is substantial, and whether the carrier must make a preferential rate if it desires to meet it. The fourth section also contains two other rigid rules. The long haul rate is never to be greater than the sum total of the locals included therein, and whenever a carrier lowers a rate in

order to meet water competition it may not afterwards increase its rate merely because the water competition has been removed.

Topic A. Discrimination at Common Law and under Statute

§ 752. Locality has no right at common law to complain of rates.

At common law the carrier deals with individuals, not with cities or towns, and only a person, natural or artificial, has a right to complain that rates are too high. Except under a statute, a locality or the citizens in general cannot complain of the rates charged by a carrier. At common law the wrong, if any, is against the individual shippers at the various stations. They may complain if the rates charged them are unreasonable. While discrimination in rates between individuals is illegal, even if the higher rate is reasonable in itself, this is not true as to discrimination between localities. If a general rate charged to all shippers in a certain place is reasonable in itself, it is not rendered illegal merely because shippers in another place are charged a lower rate; but the lower rate may be used as evidence that the higher rate is unreasonable.* Though discrimination between localities is not in itself illegal at common law, it is as offensive to sound public policy and to the principles of the law of public service as is discrimination between individuals. While it is true that a carrier possessed of such power may exert it for the benefit of the territory which it serves, it is also true that it is a power which cannot consistently with public safety be lodged in the hands of any individual or group of individuals who are not subject to public control. While it may be used to convert a wilderness into a city, it may also be used to convert a city into a wilderness. The public interest in the equal treatment of localities by carriers is so obvious that in time the courts might have placed discrimination between localities on the same

* Interstate Commerce Commission v. L. & N. Ry., 73 Fed. 409.

plane as discrimination between individuals. Not having done so, that step has been taken by legislation.

§ 753. Statutory regulation of discrimination between localities.

Under these provisions of the Act, quoted in the first section of this chapter, a community is entitled to something more than a reasonable rate; it is entitled to a non-discriminatory rate. A carrier may not say: "We will give to this community a reasonable rate," and meet the full requirement of the law. It must view its rates as a whole, and see to it that they effect no advantage or preference to one community over another, which does not arise necessarily out of transportation advantages which the one has over the other.⁷ A community may be less concerned with the absolute reasonableness of the rate to which it is subject than it is with the rates charged to its competitors. Minneapolis and Duluth, for instance, are less concerned with the amount of the rate than they are with the maintenance of the present adjustment to those points and to Chicago. A change in the relative situation, even though slight, may give to one pre-eminent advantage and destroy the other.⁸ Any discrimination is *prima facie* unlawful. It always calls for explanation. The general principle has been well expressed in these words: "It is insisted that these differentials give an undue preference for the reason that they are without excuse or justification. If the assumption of fact in this statement is true, the conclusion probably follows. A preference without legitimate excuse would be in and of itself an undue and unreasonable one."⁹ It follows, therefore, that "a disturbance of a settled equality between localities by making for the first time a difference between them is *prima facie*

⁷ Railroad Commission of Nevada v. Sou. Pac. Ry., 21 I. C. C. 329; In re Advances in Demurrage Charges, 25 I. C. C. 314.

⁸ In re Investigation of Advances

in Rates on Grain, 21 I. C. C. 22.

⁹ Prouty, Com., in New York Produce Exchange v. Baltimore & O. R. R., 7 I. C. C. Rep. 613.

unreasonable, and should be looked upon with suspicion.”¹⁰ A carrier may not serve one community at the expense of another, or build a rate wall around one point to advance the interests of a competing point.¹¹ Neither may it by arbitrary rate adjustments determine that one market shall have a certain territory and another market a certain other territory. Every market and every shipper has a right to go as far as reasonable and non-discriminatory rates will carry.¹² Under such rates, producers, dealers and consumers have a right to select the markets to which they will ship their commodities and the routes by which they shall move.¹³ Where the same carrier serves two districts which are in substantially similar circumstances and conditions, the serving carrier cannot lawfully prefer one in any manner whatsoever.¹⁴ Equality between great and small is one of the underlying principles of the Act.¹⁵ Even if the removal of an unjust discrimination between two markets somewhat injuriously affects a third market, that fact would be no excuse for permitting the unjust discrimination to continue.¹⁶ If a rate is unlawful, the effect of its removal upon either the railway or the shipper is immaterial. Hence if an application of rates to actual conditions works a discrimination against a local creamery in favor of a centralizer, the rates are for that reason unlawful and should not be maintained, no matter what the effect upon the business or the property rights of the centralizer may be.¹⁷

¹⁰ *Knapp, Com., in Board of Trade of Lynchburg v. Old Dominion S. S. Co.*, 6 I. C. C. Rep. 632.

¹¹ *Indianapolis Freight Bureau v. C., C., & St. L. Ry. Co.*, 26 I. C. C. 53.

¹² *In re Advances on Barley*, 24 I. C. C. 664.

¹³ *Commercial Club of Superior v. G. N. Ry.*, 24 I. C. C. 96; *Aransas Pass Channel & Dock Co. v. G. H. & S. A. Ry.*, 27 I. C. C. 403.

¹⁴ *Corn Belt Meat Producers' Ass'n v. C., B. & Q. Ry.*, 14 I. C. C. 376; *Black Mountain Coal Land Co. v. Southern Ry.*, 15 I. C. C. 286.

¹⁵ *Harbor City Wholesale Co. v. So. Pac. Ry.*, 19 I. C. C. 323.

¹⁶ *Superior Commercial Club v. G. N. Ry.*, 25 I. C. C. 342.

¹⁷ *Beatrice Creamery Co. v. I. C. Ry.*, 15 I. C. C. 109.

§ 754. Lower rate as evidence of unreasonableness of higher.

When a rate between two points is attacked by an individual shipper as unreasonable in itself, he may offer, as evidence in support of his complaint, to show that rates are lower for a similar haul between other points.¹⁸ This view is well stated by Judge Severens, who said: "It is assumed in argument by counsel in making defense that the rates to Chattanooga are just and reasonable in themselves. This, it is said, is conceded, and upon the premises it is urged, in substance, that the public at Chattanooga has no right to complain if the respondents lower their rates to Nashville. In one sense, this is true. But the suggestion is fruitful of other considerations. The question whether the rates are just and reasonable in themselves is in some measure a relative one; that is to say, it may be tested by a comparison of the particular rates with those accepted elsewhere for a similar service, and whether the instances thus employed are or are not such as by their relation to the case in hand are subject to the operation of some other provision of the Commerce Act, is immaterial. Besides, I think the question of the justness and reasonableness of rates under the first section is colored by the other provisions of the law, and by the general policy of the whole enactment, which is to effect the equality of charges. And, at all events, it seems to me clear that the charges accepted for a longer haul may be referred to for the purpose of considering the reasonableness of the charges made for the shorter haul."¹⁹ In that case, on appeal, the Supreme Court did not pass upon the reasonableness of the lower rate in itself on the ground that the Commission had not done so.²⁰

¹⁸ *State v. M. & S. L. Ry.*, 80 Minn. 191, 83 N. W. 60; *Cordele Machine Shops v. L. & N. Ry.*, 6 I. C. C. Rep. 361; *Johnson v. C., M. & St. P. Ry.*, 9 I. C. C. Rep. 221.

¹⁹ *Interstate Commerce Commission v. E. T., V. & G. Ry.*, 85 Fed. 107.

²⁰ *East Tennessee, V. & G. Ry. v. Int. Com. Comm.*, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. 516.

§ 755. Weight to be given to such evidence.

How much weight shall be given to such evidence must, of course, depend on the facts of each case. When rates to Danville were in question the court gave considerable weight to rates charged for similar hauls. "Whether or not the Danville rates are reasonable *per se* is a question that has given me no small amount of trouble. That the cost of transporting freight by wagons is not a proper test is very clear. The rates at Lynchburg cannot be alone used as a basis of comparison. The criteria to which I think the greatest weight should be given are as follows: The opinions of expert witnesses; the effect of the present rates on the growth and prosperity of Danville; the cost of transportation as compared with the rates charged; and the rates in force at numerous other cities, where the circumstances are as nearly similar as may be to those prevailing at Danville. The inconclusive and unsatisfactory results, and the inherent difficulties in applying the above-mentioned tests, have led me to the conclusion that the most satisfactory test to be applied in this case is to compare the Danville rates with those in force at numerous other cities and towns in the South, where the circumstances are as nearly as may be similar to those at Danville. This has been done by numerous witnesses for the defense. The result of comparisons between these rates and the Danville rates is the conclusion that the latter compare favorably with the former."²¹ The courts, however, recognize that the relation of rates is the incongruous outcome of previous adjustments and changes made with reference to places other than complainant, rather than the result of any consistent plan having care for the just and equal rights of all.²²

§ 756. Higher rate not necessarily unreasonable.

On the other hand, it has been held that a comparison

²¹ Quoted from McDowell, Dist. J., in *Int. Com. Commission v. Southern Ry.*, 117 Fed. 741.

²² *Mayor & Council of Douglas v. A. B. & A. Ry.*, 28 I. C. C. 445.

of rates between two places is not of itself enough to justify the conclusion that the higher rate is unreasonable, even if the difference is not explained by the carrier. "The bill in this case charges that the rates charged by the appellees on goods shipped from St. Louis and Tennessee points to Hampton, Fla., are unreasonably high in themselves, in violation of section 1 of the Act to Regulate Commerce. As we read the opinion of the Commission, filed as an exhibit to the bill, the Commission did not find that the Hampton rates were in and of themselves unreasonable, but found argumentatively that they were too high, not as based upon the matters to be considered in determining such questions, as pointed out in *United States v. Freight Association*,²³ and *Smyth v. Ames*,²⁴ but largely upon a consideration of rates and charges between St. Louis, Nashville and Chattanooga, and Jacksonville and Palatka, Fla. The evidence submitted to the Commission, supplemented by evidence taken in the Circuit Court, is not sufficient for us to find affirmatively that the Hampton rates were in and of themselves unreasonable. The Commission furnishes the authority for the proposition that with regard to the exaction of unreasonable rates the burden of proof is on the complainant.²⁵ Certainly, the complainant has failed in this instance to prove that the Hampton rates were in violation of the first section of the Interstate Commerce Act."²⁶ Hence it follows that if the higher of two rates is not unreasonable *per se*, the carrier may remove a discrimination between two localities by charging the higher rates to both.²⁷

²³ 166 U. S. 331, 17 Sup. Ct. 540, 41 L. ed. 1007.

²⁴ 169 U. S. 546, 18 Sup. Ct. 418, 42 L. ed. 819.

²⁵ See *Harding v. C., St. P., M. & O. R. Co.*, 1 I. C. C. Rep. 104; *Brewer v. L. & N. R. R. Co.*, 71 I. C. C. Rep. 234.

²⁶ The quotation is from Pardee, J.,

in *Interstate Com. Comm. v. Nashville, C. & St. L. Ry.*, 120 Fed. 934.

²⁷ In order to remove discrimination in rates on wool in favor of Lewiston, Me., against Skowhegan, Me., carriers advanced rates from Lawrence to Lewiston. *Massachusetts-Maine Wool Rates*, 28 I. C. C. 396.

§ 757. Reasonableness of rate per se immaterial under statute.

Under the provisions of such a statute as the Interstate Commerce Act, the fact that a rate is *per se* reasonable does not disprove the charge that it is unlawful. A rate may be relatively unreasonable and yet contain none of the elements of absolute unreasonableness.²⁸ If rates are relatively unjust, so that undue preference is afforded to one locality or undue prejudice results to another, the law is violated and its penalties incurred, although the higher rate is not in itself excessive.²⁹ The right of one locality in that regard is not increased, nor is the equal right of a competing locality diminished, by municipal subscriptions which were advanced for the building of the road.³⁰

*Topic B. General Principles of Statutory Regulation***§ 758. What discrimination is not unlawful.**

It is impossible to have a rate adjustment which places all towns and cities upon an exact equality.³¹ The Act clearly recognizes that some discrimination, either slight in extent or the result of dissimilar conditions or circumstances beyond the carrier's control, may be permitted. Only such as is undue or unreasonable is forbidden and declared unlawful.³² Discriminations covered by sections

²⁸ *New Pittsburgh Coal Co. v. H. V. Ry.*, 26 I. C. C. 121.

²⁹ *Knapp, Com., in Board of Trade of Lynchburg v. Old Dominion S. S. Co.*, 6 I. C. C. Rep. 632; *Stacy Mercantile Co. v. M., St. P. & S. St. M. Ry.*, 18 I. C. C. 550; *Morgan Grain Co. v. A. C. L. R. R. Co.*, 19 I. C. C. 460.

³⁰ *Lincoln Board of Trade v. Burlington & M. R. R. R.*, 2 Int. Com. Rep. 95, 2 I. C. C. Rep. 147.

³¹ *Kindel v. N. Y., N. H. & H. Ry.*, 15 I. C. C. 555.

³² *New York Produce Exchange v.*

B. & O. Ry., 7 I. C. C. Rep. 612; *Commercial & Industrial Ass'n of Union Springs v. L. & N. Ry.*, 12 I. C. C. 372; *Indianapolis Freight Bureau v. C., C. & St. L. Ry.*, 15 I. C. C. 504; *Herbeck-Demer Co. v. B. & O. Ry.*, 17 I. C. C. 88; *Loch Lynn Construction Co. v. B. & O. Ry.*, 17 I. C. C. 396; *Railroad Commission of Nevada v. So. Pac. Ry.*, 21 I. C. C. 329; *In re Advances in Demurrage Charges*, 25 I. C. C. 314; *Louisiana Sugar Planters' Ass'n v. I. C. Ry.*, 31 I. C. C. 311; *Eagle Distillery v. L. H. & St. L. Ry.*, 32

3 and 4 of the Act, in so far as they result from the bona fide action of the carrier in meeting circumstances and conditions not of its own creation and which are reasonably necessary, do not of necessity fall under the condemnation of the law.³³ It is recognized that within certain limits a carrier is bound to protect its territory and make rates which will foster enterprises upon its system, even though the result is to discriminate against other enterprises of a similar nature elsewhere. But such discrimination must not be undue.³⁴ For instance, a carrier may not go so far as to refuse to carry the products of competing industries on connecting lines.³⁵ Whether it is undue is a question of fact, not of law,³⁶ in the determination of which the Commission is not clothed with arbitrary power.³⁷ Each case must be judged upon its own merits,³⁸ but the Commission has held that in general any preference which is conferred upon a city by the mere policy of the carrier and not because of actual difference in conditions is undue.³⁹ But if the prejudice arising out of it against one person is not a cause of advantage to another it is not undue.⁴⁰ In passing upon the question, it is not only

I. C. C. 195. "Under the Interstate Commerce Act, differential and discriminative rates are allowable so long as they are not unjust and do not operate unfairly, and the essence of the Act is that, whatever the rate, it shall be the same to all persons similarly situated." *Pittsburgh, etc., Ry. v. Mitchell*, 175 Ind. 196, 91 N. E. 735. See also *Cincinnati, N. O. & T. P. Ry. v. Interstate Commerce Commission*, 162 U. S. 184, 40 L. ed. 935, 16 Sup. Ct. 700, and *Interstate Commerce Commission v. Alabama Midland Ry.*, 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. 45.

³³ *Pittsburg Plate Glass Co. v. P., C., & St. L. Ry.*, 13 I. C. C. 87.

³⁴ *Reliance Textile & Dye Works v. Southern Ry.*, 13 I. C. C. 48; *Re-*

ceivers and Shippers' Ass'n of Cincinnati v. C., N. O. & T. P. Ry., 18 I. C. C. 440.

³⁵ *Standard Lime & Stone Co. v. Cumberland Valley Ry.*, 15 I. C. C. 620.

³⁶ *United States v. Tozer*, 37 Fed. 369, 2 Int. Com. Rep. 597; *State v. Adams Express Co.*, 171 Ind. 138, 85 N. E. 337; *Merchants' Cotton Press & Storage Co. v. I. C. Ry.*, 17 I. C. C. 98.

³⁷ *Railroad Commission of Nevada v. So. Pac. Ry.*, 21 I. C. C. 329.

³⁸ *Chamber of Commerce of Newport News v. So. Ry.*, 23 I. C. C. 345.

³⁹ *In re Application of Southern Pacific*, 22 I. C. C. 366.

⁴⁰ *Chicago Board of Trade v. A., T. & S. F. Ry.*, 29 I. C. C. 438.

legitimate, but necessary, to take into consideration, besides the mere differences in charges, various elements, such as the convenience of the public, the fair interest of the carrier, the relative quantities or volume of the traffic involved, the relative cost of the services and profit to the company, and the situation and circumstances of the respective customers with reference to each other.⁴¹ Discrimination which might be unlawful under section 3 may in some cases be justified because made in order to avoid a violation of section 4.⁴²

§ 759. Discrimination which is not undue.

Discrimination cannot be considered undue within the meaning of the Act unless it has some appreciable effect. There may be some disproportion in rates for which the carrier is responsible, and which possibly results in some benefits to a given community as against its commercial rival; but to be obnoxious to the law it must appear that the preference and advantage in the one case, and the corresponding prejudice and disadvantage in the other, are so appreciable and established with such a degree of certainty as to be justly declared unreasonable.⁴³ In deciding whether the discrimination complained of is undue, the Commission cannot indulge in speculation as to the motives which actuated the carrier in fixing an adjustment of freight rates as between various points of origin, but can only determine upon the facts and conditions whether or not the rates in question are unreasonable or unjustly discriminatory.⁴⁴ The fact that the complainant has been prosperous, although a matter to be considered, does not

⁴¹ *Interstate Commerce Commission v. Baltimore & O. R. R.*, 145 U. S. 263, 36 L. ed. 699, 12 Sup. Ct. 844, 4 Int. Com. Rep. 92; *Interstate Commerce Commission v. Chicago G. W. Ry.*, 141 Fed. 1003; *Lincoln Board of Trade v. Missouri Pac. Ry.*, 2 Int. Com. Rep. 98, 2 I. C. C. 155;

Tifton v. Louisville & N. R. R., 9 I. C. C. Rep. 160.

⁴² *Atlanta Journal Co. v. S. A. L. Ry.*, 28 I. C. C. 186.

⁴³ *Knapp, Com., in Commercial Club of Omaha v. Chicago & N. R. R.*, 7 I. C. C. Rep. 386.

⁴⁴ *Grand Junction Mining & Fuel Co. v. C. M. Ry.*, 16 I. C. C. 452.

conclusively show that defendant's rates are not discriminatory.⁴⁵ Nor can discrimination be predicated upon the fact that complainant's competitors are able to undersell complainant.⁴⁶ A discrimination between localities may be harmful and at the same time not constitute an undue discrimination because of other factors, such as railroad competition.⁴⁷ The Commission has held that the most satisfactory test for ascertaining whether relative injustice is being done one section as compared with another is the relative earnings per car.⁴⁸ Another way of showing undue prejudice and disadvantage under the third section is by showing unreasonableness in rate under the first section and then comparing it with rates to similarly located places.⁴⁹ Comparisons between railroads are of little or no value as evidence of undue preference,⁵⁰ but the value of the commodity concerned may be an important factor.⁵¹

§ 760. Interdependence of rates to various localities.

The theory upon which the Act is administered is that there is a certain interdependence in a schedule of rates, and that rates to various related localities should not be outrageously disproportionate. By this test it is not enough that the rate charged a particular locality is not unreasonable in itself; the requirement of the Act is that there shall be no undue preference or priority between locali-

⁴⁵ *Hitchman Coal & Coke Co. v. B. & O. Ry.*, 16 I. C. C. 512.

⁴⁶ *Western Fruit Jobbers' Ass'n v. C., R. I. & P. Ry.*, 27 I. C. C. 417. Where rival mine operators have the same freight rates to an equally accessible territory, the failure of one of them to sell in the near-by markets must be due either to a difference in the quality of the coal, the cost of operating, or the aggressiveness of the respective selling forces. These are disadvantages which can be removed only by the complainant and

do not constitute undue prejudice. *North Fork Cannel Coal Co. v. A. A. Ry.*, 25 I. C. C. 241.

⁴⁷ *Gund & Co. v. C., B. & Q. Ry.*, 25 I. C. C. 326.

⁴⁸ *Ozark Fruit Growers' Ass'n v. St. L. & S. F. Ry.*, 16 I. C. C. 106.

⁴⁹ *Board of Trade of Carrollton v. C. of G. Ry.*, 28 I. C. C. 154.

⁵⁰ *Stonega Coal & Coke Co. v. L. & N. Ry.*, 23 I. C. C. 17.

⁵¹ *Coke Producers' Ass'n of Connellsville v. B. & O. Ry.*, 27 I. C. C. 125.

ties unless the circumstances and conditions are dissimilar. These elementary principles were well set forth by the Interstate Commerce Commission in applying the Act in a Minnesota case.⁵² "It is said that the rate from St. Cloud is reasonable in and of itself. A rate can seldom be considered 'in and of itself.' It must be taken almost invariably in relation to and in connection with other rates. The freight rates of this country, both upon different commodities and between different localities, are largely interdependent, and it is the fact that they do not bear a proper relation to one another, rather than the fact that they are absolutely either too low or too high, which most often gives occasion for complaint, and which is the ground of complaint here. A rate of 12 cents per hundred pounds on flour from St. Cloud to Duluth may be reasonable when compared with a similar rate from Minneapolis. When compared with a rate of 5½ cents from the latter place, it is certainly *prima facie* grossly unreasonable. Minneapolis and St. Cloud are competitors in the milling business, and when this defendant charges the St. Cloud miller 12 cents per hundred pounds for transporting his flour from St. Cloud to Duluth, while it charges the Minneapolis miller but 5½ cents for identically the same service plus an additional haul of 60 miles, it is guilty of a discrimination against the St. Cloud shipper, which is not justified by the circumstances of this case." But in order to show undue preference, comparison is to be made between the different rates of the same carrier. No undue discrimination is proved by the fact that a carrier maintains lower rates from points on its line than other carriers maintain on the same traffic from near-by points on their lines.⁵³

§ 761. No vested right in preferential rates.

A rate which is unduly discriminatory should when discovered be removed. A community can never acquire a

⁵² *George Tileston Mill Co. v. No. Pac. Ry.*, 8 I. C. C. 354.

⁵³ *Stonega Coal & Coke Co. v. L. & N. Ry.*, 23 I. C. C. 17.

vested right in an undue preference. Mere lapse of time cannot be permitted to rob a locality of its right to relief from a schedule which in view of changed conditions would be a manifest discrimination if continued.⁵⁴ To remove an unjust preference an advance in rates may be permitted⁵⁵ or a reduction may be ordered.⁵⁶ A reduction may also be suspended when the effect of such suspension will be to prevent an unjust discrimination.⁵⁷ In case of any such changes the burden is then on the carrier to adjust its rates in such a way as to meet the conditions that will arise in consequence thereof,⁵⁸ and the Commission in ordering the change does not thereby give its approval to the necessary readjustment.⁵⁹ When an undue discrimination is made to appear, the Commission will not be deterred from ordering a change by fear of disrupting commercial conditions,⁶⁰ or by the fact that it will lead to a disturbance of long-standing adjustments,⁶¹ or interfere with a general scheme adopted by several roads entering the same territory.⁶² But a long-established rate has a certain presumption in its favor, and the Commission will give much weight to rates to which commercial conditions have adjusted themselves,⁶³ and will pro-

⁵⁴ Mississippi River Case, 28 I. C. C. 47.

⁵⁵ Tants Bros. & Co. v. L. V. Ry., 17 I. C. C. 167.

⁵⁶ Kindel v. N. Y., N. H. & H. Ry., 15 I. C. C. 555; Scott Paper Co. v. Penn. Ry., 26 I. C. C. 601.

⁵⁷ Board of Trade of Chicago v. I. C. Ry., 26 I. C. C. 545.

⁵⁸ Baer Brothers' Mercantile Co. v. M. P. Ry., 17 I. C. C. 225; Chattanooga Feed Co. v. A. G. S. Ry., 22 I. C. C. 480.

⁵⁹ In re Advances on Manganese Ore, 25 I. C. C. 663.

⁶⁰ Middlesboro Board of Trade v. L. & N. Ry., 27 I. C. C. 14.

⁶¹ Kansas City Transportation Bureau v. A., T. & S. F. Ry., 15 I. C. C.

491; Columbia Grocery Co. v. L. & N. Ry., 18 I. C. C. 502; Milburn Wagon Co. v. L. S. & M. S. Ry., 22 I. C. C. 93; Indianapolis Freight Bureau v. C., C. & St. L. Ry., 26 I. C. C. 53; Wickwire Steel Co. v. N. Y. C. & H. R. Ry., 27 I. C. C. 168.

⁶² Black Mountain Coal Land Co. v. Southern Ry., 15 I. C. C. 286.

⁶³ Ohio Allied Milk Product Shippers v. E. Ry., 21 I. C. C. 522; Chattanooga Feed Co. v. A. G. S. Ry., 22 I. C. C. 480; Chamber of Commerce of New York v. N. Y. C. & H. R. Ry., 24 I. C. C. 55; Winsor Coal Co. v. C. & A. Ry., 52 Fed. 716. But compare Matthews v. Board of Corp. Commissioners, 106 Fed. 7.

ceed with caution when a change of one rate will necessitate a widespread readjustment.⁶⁴ The carrier also must pay respect to existing conditions; and where an industry has been required to pay for a long period of time rates of freight on raw material which bear certain relations to rates charged to competitors at other points, a marked change in such rate relations in favor of competing industries cannot be made without an attendant presumption of undue discrimination.⁶⁵

§ 762. Discrimination explained by local circumstances.

Circumstances may, however, so explain the difference between the rates compared as to deprive the lower of any bearing on the higher. "It is earnestly contended by counsel for the appellant that the rates at the longer-distance points being shown to be reasonably remunerative, and the rates at the shorter-distance points being admitted to be higher, the latter must, of logical necessity, be found to be unreasonably high, and therefore unreasonable and unjust, and such as give an undue preference to the longer-distance points, and subject the shorter-distance points to an undue and unreasonable prejudice and disadvantage. It will be perceived that this argument excludes all consideration of the force of competition, and ignores its presence at the longer-distance points and its comparative absence from the shorter-distance points. What is a reasonable action, or a reasonably remunerative rate for carriage, at a given time and place, necessarily has relation to the circumstances and conditions bearing upon the actor or upon the carrier at the time and place."⁶⁶ As will be seen in the subsequent discussion, competition is the circumstance which is most commonly relied on to justify discrimination; but any of the circumstances which were discussed

⁶⁴ *Southwestern Shippers' Traffic Ass'n v. A. T. & S. F. Ry.*, 24 I. C. C. 570. *ical Works v. M. C. Ry.*, 13 I. C. C. 357.

⁶⁵ *Howard Mills Co. v. Mo. Pac. Ry.*, 12 I. C. C. 258; *Detroit Chemical Works v. M. C. Ry.*, 13 I. C. C. 357. ⁶⁶ *McCormick, J., in Interstate Com. Comm. v. Western & A. R. R.*, 93 Fed. 83.

in former chapters as affecting the distance-charge would be of equal pertinence. An apparent discrimination may therefore upon an examination of all the circumstances prove to be a reasonable and equitable adjustment.

§ 763. Distance as a factor in rate making.

In comparing rates from two points to a common destination, distance is the first factor to consider, though it is not controlling nor always the most important. As has often been stated, rates are not made on a ton-mile basis, and they cannot be expected to bear an exact proportion to the distance.⁶⁷ Rates may sometime be made on an arbitrary mileage basis; but the commerce of the country is now established on a different basis, and the Commission at this time declines to undertake such a revolution as a change to a mileage basis would involve.⁶⁸ The Commission has held that in the case of long hauls, ranging from 650 to 1245 miles, a considerable addition in mileage could well be overlooked, especially where the necessity exists of maintaining points of production and consumption on an equality with their competitors.⁶⁹ If, however, the localities are neighboring ones and the conditions substantially the same, distance should govern.⁷⁰ Spokane was right in

⁶⁷ *LaCrosse M. & J. Union v. C., M. & St. P. Ry.*, 2 Int. Com. Rep. 9, 1 I. C. C. 629; *Business Men's Association v. C., S. P. N. & O. Ry.*, 2 Int. Com. Rep. 41, 2 I. C. C. 52; *Business Men's Association v. C. & N. W. Ry.*, 2 Int. Com. Rep. 48, 2 I. C. C. 73; *Lincoln Board of Trade v. B. & N. Ry.*, 2 Int. Com. Rep. 95, 2 I. C. C. 147; *Poughkeepsie Iron Co. v. N. Y. C. & H. R. Ry.*, 3 Int. Com. Rep. 248, 4 I. C. C. 195; *James & M. B. Co. v. C., N. O. & T. P. Ry.*, 3 Int. Com. Rep. 682; *Board of Railway Commissioners v. A., T. & S. F. Ry.*, 8 I. C. C. Rep. 304; *Kansas City Transportation Bureau v. A., T. & S. F. Ry.*, 16 I. C. C. 195; *Greater*

Des Moines Committee v. C., M. & St. P. Ry., 18 I. C. C. 73; *Omaha Grain Exchange v. C. & N. W. Ry.*, 19 I. C. C. 424; *Interstate Commerce Commission v. Union Pac. Ry.*, 222 U. S. 541, 32 Sup. Ct. 108, 56 L. ed. 308.

⁶⁸ *Wichita Board of Trade v. A. & S. Ry.*, 29 I. C. C. 376.

⁶⁹ *Lumber Rates Texas, etc., to Oklahoma and Missouri*, 28 I. C. C. 471. See also *William Co. v. U. S. & P. Ry.*, 16 I. C. C. 482.

⁷⁰ *James v. E. T., V. & G. Ry.*, 2 Int. Com. Rep. 609, 3 I. C. C. 225; *Eau Claire Board of Trade v. C., M. & St. P. Ry.*, 4 Int. Com. Rep. 65, 5 I. C. C. 264; *Hill v. N. C. & St. L.*

its contention that a schedule which permits merchandise to be hauled from the east over the Cascade mountains to Seattle and back again to the consumer on the east side of that range must be wrong.⁷¹ In any case the relative difference should not be arbitrary or unreasonable.⁷² The comparative distance should be tested by the distance over the shortest available route from the place of shipment to the point in question.⁷³

§ 764. Difference between through and local rates.

As a general rule the through rate should be less than the sum of the intermediates on account of the fewer terminal services involved.⁷⁴ Hence it follows that a through rate over several roads may be proportionally smaller than the local rate over one of the roads; and in the division of a through rate one road may, therefore, properly accept a smaller amount than it would charge for a carriage to or from its own terminus. Such a propor-

Ry., 6 I. C. C. Rep. 343; *Brewer v. L. & N. Ry.*, 7 I. C. C. Rep. 224; *In re Alleged Violation of Act*, 8 I. C. C. Rep. 290; *Union Tanning Co. v. Southern Ry.*, 26 I. C. C. 159; *Edgar & Sons v. L. & N. Ry.*, 26 I. C. C. 181; *Cherokee Lumber Co. v. A. C. L. Ry.*, 27 I. C. C. 438; *Traffic Bureau of Nashville v. L. & N. Ry.*, 28 I. C. C. 533; *Kansas Wholesale Grocery Co. v. A. & W. Ry.*, 32 I. C. C. 139.

⁷¹ *City of Spokane v. No. Pac. Ry.*, 19 I. C. C. 162.

⁷² *Toledo Produce Exchange v. L. S. & M. S. Ry.*, 3 Int. Com. Rep. 830, 5 I. C. C. 166; *Gerke Brewing Co. v. L. & N. Ry.*, 4 Int. Com. Rep. 267, 5 I. C. C. 596; *Rea v. M. & O. Ry.*, 7 I. C. C. Rep. 43.

⁷³ *Milwaukee Chamber of Commerce v. C., M. & St. P. Ry.*, 7 I. C. C. Rep. 481.

⁷⁴ *Montgomery Freight Bureau v. W. Ry. of A.*, 14 I. C. C. 150; *Williams Co. v. V., S. & P. Ry.*, 16 I. C. C. 482; *Winona Carriage Co. v. Penn. Ry.*, 18 I. C. C. 334; *Bott Bros. Mfg. Co. v. C., B. & Q. Ry.*, 19 I. C. C. 136; *Railroad Commission of Nevada v. N. C. O. Ry. & S. V. Ry.*, 22 I. C. C. 205; *Bluefield Shippers' Ass'n v. N. & W. Ry.*, 22 I. C. C. 519; *Lumbermen's Exchange of St. Louis v. A. & S. R. Ry.*, 24 I. C. C. 220; *Railroad Commission of Oregon v. So. Pac. Ry.*, 24 I. C. C. 273; *Appalachia Lumber Co. v. L. & N. Ry.*, 25 I. C. C. 193; *In re Advances on Potatoes*, 25 I. C. C. 247; *Jubits v. So. Pac. Ry.*, 27 I. C. C. 44; *Washington Milling Co. v. N. & W. Ry.*, 27 I. C. C. 546; *Iowa State Board v. A. E. Ry.*, 28 I. C. C. 193; *Boston Chamber of Commerce v. A., T. & S. F. Ry.*, 28 I. C. C. 230.

tional rate cannot be used as a conclusive standard by which to measure the reasonableness of the intermediate rate,⁷⁵ nor is it an undue preference against its own terminus.⁷⁶ Therefore, the inland portion of export rates may, without undue discrimination, be less than the domestic rate,⁷⁷ and conversely, a carrier may lawfully make an import rate from a port in the United States to an interior destination less than its domestic rate over the same route.⁷⁸ But in order to justify such a practice, it must appear when the commodity was delivered to the domestic carrier that it was intended for export. Otherwise the domestic rate must be charged.⁷⁹ A shipper's "state of mind in relation to the goods—that is, his intention to export them and his partial preparation to do so"—does not make them export traffic.⁸⁰ But the rates to a given port may not vary because the ultimate destination of the goods is different.⁸¹ As between two points on a connecting line, it would seem that the carrier should not

⁷⁵ *Southern Illinois Millers' Ass'n v. L. & N. Ry.*, 23 I. C. C. 672; *Southwestern Shippers' Traffic Ass'n v. A., T. & S. F. Ry.*, 24 I. C. C. 570; *Wichita Board of Trade v. A., T. & S. F. Ry.*, 25 I. C. C. 625; *New Pittsburgh Coal Co. v. H. V. Ry.*, 26 I. C. C. 121; *Board of Trade of Winston-Salem v. N. & W. Ry.*, 26 I. C. C. 146; *Pulp and Paper Manufacturers' Ass'n v. C., M. & St. P. Ry.*, 27 I. C. C. 83; *Sandstone, Minn.-Missouri River Building Stone Rates*, 28 I. C. C. 269.

⁷⁶ *Parsons v. Chicago & N. W. Ry.*, 63 Fed. 903, 11 C. C. A. 489, affirmed, 167 U. S. 447, 42 L. ed. 231, 17 Sup. Ct. 887; *Tozer v. United States*, 52 Fed. 917, 4 Int. Com. Rep. 245; *Crews v. Richmond & D. R. Ry.*, 1 Int. Com. Rep. 703, 1 I. C. C. 401; *McMorran v. Grand Trunk Ry.*, 2 Int. Com. Rep. 604, 3 I. C. C. 252.

⁷⁷ *Texas & Pac. Ry. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. ed. 940, 16 Sup. Ct. 666; *Kemble v. Boston & A. R. Ry.*, 8 I. C. C. Rep. 110; *Re Export and Domestic Rates*, 8 I. C. C. Rep. 214, modifying the view earlier expressed in *Detroit Board of Trade v. Grand Trunk Ry.*, 2 Int. Com. Rep. 199, 2 I. C. C. 315; *New York Produce Exch. v. New York C. & H. R. Ry.*, 2 Int. Com. Rep. 553, 3 I. C. C. 137; *Erickson Co. v. C., M. & St. P. Ry.*, 29 I. C. C. 414.

⁷⁸ *Joseph Ullman v. Adams Express Co.*, 14 I. C. C. 340; *New Orleans Board of Trade v. I. C. Ry.*, 23 I. C. C. 465.

⁷⁹ *Port Arthur Milling Co. v. T. & S. F. Ry.*, 28 I. C. C. 696.

⁸⁰ *Coe v. Erroll*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. 475.

⁸¹ *New Orleans Board of Trade v. I. C. Ry.*, 23 I. C. C. 465.

discriminate, but accept the same amount as its share of the through charge on each.⁸² And similarly if a lower through or export rate is allowed to one station on a railroad, a similar rate should be allowed to other stations.⁸³

§ 765. Railroad rates tend toward a cost basis.

Rate regulation upon legal principles, basing the rate charged ultimately upon the cost of the service, will not in the case of railroads, as many fear, mean an immediate recourse to a mileage basis. The chief reason that it can never come to that basis altogether is that mere mileage, as all authorities recognize, never measures the cost of the service. It is fundamental that a long haul is relatively cheaper per ton than a short haul.⁸⁴ This is all the clearer if the shorter haul has unusual physical obstacles making it actually more expensive; it will then justify a lower rate for a longer haul.⁸⁵ Moreover, the less expensive terminals may make the longer route the cheaper, so that sometimes business may be better handled if great volumes of low-grade freights are diverted from congested points by differential rates. It is also often justifiable to group together various stations for convenience in making rates.

⁸² *Calloway v. L. & N. Ry.*, 7 I. C. C. Rep. 431.

⁸³ *Re Export and Domestic Rates*, 8 I. C. C. Rep. 214; *Chicago F. P. C. Co. v. Chicago & N. W. Ry.*, 8 I. C. C. Rep. 316.

⁸⁴ In the Federal courts particularly there have never been any doubts that this rule justified the making of a lower rate per ton-mile for a longer haul. See among many others: *Union Pacific Ry. Co. v. United States*, 117 U. S. 355, 29 L. ed. 920, 6 Sup. Ct. 772; *East Tennessee, V. & G. Ry. Co. v. Interstate Com. Comm.*, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. 516; *Tosser v. United States*, 52 Fed. 917;

Northern Pacific Ry. Co. v. Keyes, 91 Fed. 47; *Southern Ry. Co. v. St. Louis, H. & G. Co.*, 156 Fed. 728; *St. Louis & S. F. Ry. v. Hadley*, 168 Fed. 317; *Missouri, K. & T. Ry. Co. v. Love*, 177 Fed. 493.

⁸⁵ The possibility that the actual cost of the shorter transportation between certain points may be greater than that of a longer transportation between other points is made much of in the English cases. See among many others: *Bellsdyke Coal Co. v. North British Ry. Co.*, 2 Ry. & C. Tr. Cas. 105; *Coal Co. v. Caledonia Ry. Co.*, 2 Ry. & C. Tr. Cas. 39.

These and many other considerations may be set beside the mere mileage involved. The most satisfactory comparison to ascertain whether relative injustice is being done to one section as against another is through the earnings per car.⁸⁶ But undoubtedly rate regulation in the future will pay more attention to operating cost and mileage tables than in the past.

§ 766. Various systems of making distance rates.

These statutory provisions affect rate making only to a certain extent. "There are four principal methods of making rates to localities: that prevailing in the Trunk Line Territory, in practical compliance with the fourth section; that in the Southeastern Territory, where basing points or trade centers are recognized to which through rates are made and the local rates are added for rates to tributary territory. To the Pacific coast, water competition has brought about low rates, and a combination of these with the local rate back fixes the rates for the interior mountain territory points. In the case under consideration rates are made to Colorado common points with Denver, Colorado Springs, Pueblo and Trinidad named as such points in the schedules, but there are several hundred smaller intermediate points to which the rates apply, so that the system is nearly the equivalent of a blanket rate, or a like rate for a large territory. The coast system of rate making by adding the local back to the low through rate arouses complaints, for the reason that the shortest haul where the system prevails has the highest rate; that is, rates are lower the nearer to the coast terminal—an apparent violation of the fourth section. The basing point system arouses friction, in that rival centers and shorter-distance points demand like privileges, and the blanket rate finds objectors where an important point is ambitious to supply the surrounding territory. Each has its advantages and each is open to some objections."⁸⁷ The

⁸⁶ *Ozark Fruit Growers' Ass'n v. St. L. & S. F. Ry.*, 16 I. C. C. 106.

⁸⁷ Quoted from *Kindel v. Boston & A. R. R.*, 11 I. C. C. Rep. 495.

system of basing points was held illegal by the Commission,⁸⁸ but in this it was not sustained by the Supreme Court.⁸⁹ Somewhat inconsistently the Commission has always favored group rates,⁹⁰ whereby competition in commodities carried is preserved.⁹¹

§ 767. Burden upon the railroad to defend discriminatory rates.

Whenever a carrier establishes a discriminatory rate, it assumes the burden of justifying it. Every discriminatory rate is *prima facie* unlawful, and it can be sustained only by showing that it is authorized by some provision of the Act. The burden of showing this rests upon the carrier. In a case involving the rates to Boston from Fredericton and Fairfield, two places situated upon different branches of the same road, Commissioner Veazey said: "A departure from equal mileage rates on different branches or divisions of a road is not conclusive that such rates are unlawful, but the burden is on the company making such departure to show its rates to be reasonable when disputed. The essential question here is one of relatively reasonable rates; not whether either rate is reasonable in itself. It is the effect of the carriers' action at one point upon the legitimate business prosperity of another point, which is the vital point in this controversy. If the present Fredericton rate does not actually result in profit, the carriers should not seek to control or stimulate traffic from that point by making the rate so low; and if they carry for unusually small compensation from that place they do so

⁸⁸ *Hamilton v. Chattanooga, R. & C. R. R.*, 3 Int. Com. Rep. 482, 4 I. C. C. 686; *Perry v. Florida, C. & P. R. R.*, 3 Int. Com. Rep. 740, 5 I. C. C. 97; *Hill v. Nashville, C. & S. L. Ry.*, 6 I. C. C. Rep. 343; *Gustin v. Atchison, T. & S. F. R. R.*, 8 I. C. C. Rep. 277; *Hampton Board of Trade v. Nashville, C. & S. L. Ry.*, 8 I. C. C. Rep. 503.

⁸⁹ *Interstate Commerce Commission v. Louisville & N. R. R.*, 190 U. S. 273, 47 L. ed. 1047, 23 Sup. Ct. 687.

⁹⁰ *Howell v. New York, L. E. & W. R. R.*, 2 Int. Com. Rep. 162, 2 I. C. C. Rep. 272.

⁹¹ *Milk Dealers' Ass'n v. Delaware, L. & W. Ry.*, 7 I. C. C. Rep. 92.

under the plain injunction of the law that their action must not inflict undue prejudice or disadvantage upon other communities or persons. When a carrier engages in transportation for which, by reason of competitive conditions or for purposes of its own, it receives less rates from some patrons and at some localities, it accepts the legal obligation to give impartial service to other patrons and at other localities that sustain similar relations to the traffic." ⁹²

Topic C. What Constitutes Undue Prejudice

§ 768. Provisions against undue prejudice.

It is not enough under the Act that transportation charges to a certain place should be reasonable in themselves. Rates must also be relatively reasonable as compared with those to other places on the same line in order to prevent unlawful discrimination.⁹³ Every community is entitled to a non-discriminatory rate.⁹⁴ The fundamental

⁹² *Logan v. Chicago & N. W. R. Co.*, 2 Int. Com. Rep. 431, 2 I. C. C. Rep. 604. See also *Manufacturers & Jobbers' Union v. Minneapolis & St. L. R. Co.*, 3 Int. Com. Rep. 115, 4 I. C. C. Rep. 79; *Alpha Portland Cement Co. v. B. & O. Ry.*, 22 I. C. C. 446.

⁹³ *Boards of Trade Union v. Chicago, M. & S. P. Ry.*, 1 Int. Com. Rep. 608; *Detroit Board of Trade v. Grand Trunk Ry.*, 2 Int. Com. Rep. 199, 2 I. C. C. 315; *Re Tariffs of Transcontinental Lines*, 2 Int. Com. Rep. 203, 2 I. C. C. 324; *Milwaukee Chamber of Commerce v. Flint & P. M. R. R.*, 2 Int. Com. Rep. 393, 2 I. C. C. 553; *Manufacturers' & J. Union v. Minneapolis & S. L. Ry.*, 3 Int. Com. Rep. 115, 4 I. C. C. 79; *Lynchburg Board of Trade v. Old Dominion S. S. Co.*, 6 I. C. C. Rep. 632; *Phillips v. Louisville & N. R. R.*, 8 I. C. C. Rep. 93; *Black Mountain*

Coal Land Co. v. S. Ry. Co., 15 I. C. C. 286; *Board of Trade of Winston-Salem v. N. & W. Ry. Co.*, 16 I. C. C. 12; *In re Investigation of Rates on Meats*, 22 I. C. C. 160; *Lumbermen's Exchange of St. Louis v. A. & S. R. Ry.*, 24 I. C. C. 220; *Baker v. Cumberland Valley Ry.*, 14 I. C. C. 568. When from a geographical standpoint two rate groups are corresponding timber-producing sections, they should take the same rates. *Big Blackfoot Milling Co. v. N. P. Ry. Co.*, 16 I. C. C. 173.

⁹⁴ *R. R. Commission of Kansas v. A., T. & S. F. Ry.*, 22 I. C. C. 407; *Topeka Traffic Ass'n v. A. & V. Ry.*, 27 I. C. C. 428: "Justice cannot be done to Nevada unless Nevada points are put on a practical parity with points in eastern Washington and eastern Oregon." *R. R. Commission of Nev. v. S. P. Co.*, 19 I. C. C. 238.

principle of the Act is one of fair play.⁹⁵ Hence a carrier may not give preferential rates to shippers or commodities or localities, even though by so doing it would develop the greatest amount of traffic for itself. A carrier which has built up a seaport of its own may not discriminate in favor of that port,⁹⁶ nor may it build a rate wall around one point in order to advance the interests of a competing point,⁹⁷ nor by arbitrary adjustment of rates determine where wheat shall be milled or flour shall be marketed,⁹⁸ nor may it foster the industries upon its own system by undue discrimination against industries at points on other systems,⁹⁹ nor make rates whereby the jobbers in a given city are enabled to extend their trade,¹ nor favor one city at the expense of another as a mere matter of railroad policy,² or because it is an assembling point for freight,³ nor retain to itself the lumber market at points on its own line for the benefit of producing points thereon to the exclusion of producing points on other lines,⁴ nor discriminate in favor of a point where it maintains a market.⁵ Undue discrimination is not confined to transportation charges, but may be found in demurrage charges,⁶

⁹⁵ *Mobile Chamber of Commerce v. M. & O. Ry. Co.*, 23 I. C. C. 417.

⁹⁶ *Interstate Commerce Commission v. L. & N. Ry.*, 118 Fed. 613.

⁹⁷ *Alabama Coal Operators' Ass'n v. So. Ry.*, 21 I. C. C. 230; *Indianapolis Freight Bureau v. C., C. & St. L. Ry. Co.*, 26 I. C. C. 53; *Aransas Pass Channel & Dock Co. v. G. H. & S. A. Ry.*, 27 I. C. C. 403.

⁹⁸ *Valley Flour Mills v. A., T. & S. F. Ry. Co.*, 16 I. C. C. 73.

⁹⁹ *Reliance Textile & Dye Works v. S. Ry. Co.*, 13 I. C. C. 48.

¹ *In re Advances on Knitting Factory Products*, 25 I. C. C. 634.

² *In re Application of Southern Pacific Co.*, 22 I. C. C. 366.

³ *Iowa State Board of Railroad*

Commissioners v. A. E. Ry., 28 I. C. C. 193.

⁴ *Lumber Rates Texas, etc., to Oklahoma & Missouri*, 28 I. C. C. 471; *Aransas Pass Channel & Dock Co. v. G. H. & S. A. Ry.*, 27 I. C. C. 403; but see also *Avery Mfg. Co. v. A., T. & S. F. Ry.*, 16 I. C. C. 20. Western traffic may not be exterminated in a desire to serve the Oklahoma coal industry. *Wichita Falls System Joint Coal Rate Cases*, 26 I. C. C. 215.

⁵ *Wilson Produce Co. v. Pennsylvania Ry. Co.*, 16 I. C. C. 116.

⁶ *Pennsylvania Miller's State Ass'n v. Philadelphia & Reading Ry. Co.*, 8 I. C. C. 531; *Galveston Commercial Ass'n v. A., T. & S. F. Ry.*, 25 I. C. C. 216.

or milling-in-transit charges,⁷ or in the granting of transit privileges at one point which are denied at another,⁸ or in the allowance of elevator charges at one point and not at another,⁹ or in the granting of round-trip and week-end fares to one point which are refused to others,¹⁰ or in making joint or through rates at one point and not at another,¹¹ or in performing a switching service at one point which is refused at another,¹² or in attempting to make the rate depend on whether the goods were brought to the place of shipment by the defendant carrier.¹³ Where the rate to an intermediate point is not shown to be unreasonable in itself and there is no competition between such point and a farther distance point enjoying a lower rate from the same point of origin, section 3 is not violated.¹⁴ Nor can a complaint alleging undue prejudice against a city in that it is deprived of joint rates be sustained when the joint rates have been canceled at the points alleged to have been unduly preferred.¹⁵ No discrimination can be found in favor of a point to which the commodity involved never moved,¹⁶ nor can discrimination against a distributing point be predicated merely upon the fact that the combination of in-bound and out-bound rates on such distributing point exceeds the combination on a competitive distributing point.¹⁷ An undue discrimina-

⁷ *Spiegle & Co. v. So. Ry.*, 19 I. C. C. 522.

⁸ *Sondheimer Co. v. I. C. Ry. Co.*, 20 I. C. C. 606. Granting Los Angeles terminal rates because of water competition at San Pedro and refusing such rates at San Pedro constituted unlawful discrimination. *Harbor City Wholesale Co. of San Pedro v. So. Pac. Ry.*, 19 I. C. C. 323.

⁹ *City Council of Atchison v. Mo. Pac. Ry.*, 12 I. C. C. 111; *Duncan & Co. v. N. C. & St. L. Ry.*, 16 I. C. C. 590; *Suffern Grain Co. v. I. C. Ry.*, 22 I. C. C. 178.

¹⁰ *Beach v. A. A. R. R. Co.*, 26 I. C. C. 410.

¹¹ *Coal Rates on the Stony Fork Branch*, 26 I. C. C. 168.

¹² *Alan Wood, Iron & Steel Co. v. P. Ry.*, 22 I. C. C. 540.

¹³ *Bascom Co. v. A., T. & S. F. Ry.*, 17 I. C. C. 354.

¹⁴ *Kellogg Toasted Corn Flake Co. v. M. C. Ry.*, 24 I. C. C. 604.

¹⁵ *Baker Commercial Club v. O. W. R. R. & N. Co.*, 25 I. C. C. 281.

¹⁶ *Consumers' Ice Co. v. A., T. & S. F. Ry.*, 18 I. C. C. 277.

¹⁷ *In re Advances on Knitting Factory Products*, 25 I. C. C. 634.

tion against a given point may be effected as well by a joint rate as by a one-line rate; and the carrier that is a party to a joint rate is no less responsible when the discrimination under such rate can be controlled by it, than it would be in similar circumstances under its own one-line rate,¹⁸ but it is not responsible for rates made by a connecting road.¹⁹ If a joint rate is made with a carrier in a foreign country, and the portions of the combination rate made by the American carrier are just and reasonable, any discrimination that exists must be due to the foreign carrier, over whom the Commission has no jurisdiction.²⁰ Where one railroad is owned by another, although operated entirely separately, the Commission is supposed to regard the two railroads as one in determining whether the rates established by them unduly discriminate between different sections.²¹ In other words, the test of discrimination is the ability of one of the carriers participating in a through route to put an end to the discrimination by its own act.²²

§ 769. Discrimination resulting from intrastate rates—the Shreveport case.

The discrimination with which the Commission has had most frequent occasion to deal was that resulting from the act of the carrier. In fact it had become almost axiomatic that if the carrier was not a free agent,—if its action was forced by conditions which it could not control, or was compelled by public authority,—then the resulting discrimination was not one for which the carrier could be held responsible. Hence in a proceeding attacking a rate adjustment between various competitive coal fields to a large number of consuming centers, the Com-

¹⁸ Rates from Walsenburg Coal Field, 26 I. C. C. 85.

¹⁹ Crews v. R. & D. Ry., 1 I. C. C. R. 703, 1 I. C. C. 401.

²⁰ Fullerton Lumber & Shingle Co. v. B. B. & B. C. Ry., 25 I. C. C. 376.

²¹ Receivers' & Shippers' Ass'n of Cincinnati v. C., N. O. & T. P. Ry., 18 I. C. C. 440.

²² Elevator Allowances at St. Louis and East St. Louis, 30 I. C. C. 696.

mission held that if a purely State rate to those centers was involved, it was powerless to make an affirmative order, although it might properly note the existence of discrimination.²³ This was bound to give rise to an awkward situation, for where jobbing centers are situated near State lines, an advance of the interstate charge and the retention of the existing charge on State shipments must necessarily result in discrimination against the former.²⁴ The whole matter has now been settled in a most satisfactory manner by the recent decision of the Supreme Court in the Shreveport case.²⁵ Complaint was made that a carrier operating between Dallas, Texas, and Shreveport, Louisiana, made rates eastward from Dallas to other Texas points much lower than the rates from Shreveport to those points, although the distance from Shreveport might be considerably less. For instance, the rate on wagons from Dallas to Marshall, Texas, a distance of 147.7 miles, was 36.8 cents, while from Shreveport to Marshall, a distance of 42 miles, it was 56 cents. The defense of the carrier was that its rates between Texas points were fixed by the Texas Railroad Commission, and that such rates were outside the jurisdiction of the Interstate Commerce Commission. The latter held that while intrastate rates might be beyond its control, the resulting discrimination against points in other States was not; and it ordered that all rates between Dallas and Shreveport be put upon a distance basis and so adjusted as to avoid discrimination. The carrier appealed on the ground that since the discrimination found by the Commission to be unjust arose out of the relation of intrastate rates maintained under State authority to interstate rates that have been upheld as reasonable, its correction was beyond

²³ *Wilmington Tariff Ass'n v. C. P. & V. A. Ry.*, 9 I. C. C. 48; *Andy's Ridge Coal Co. v. Southern Ry.*, 18 I. C. C. 405; *Saunders & Co. v. Southern Express Co.*, 18 I. C. C. 415.

²⁴ *In re Rates for Single Packages*, 22 I. C. C. 328.

²⁵ *Houston & Texas Ry. v. United States*, 234 U. S. 342, 58 L. ed. 1341, 34 Sup. Ct. 833.

the Commission's power. This contention was not sustained. The Supreme Court, speaking through Mr. Justice Hughes, said, "Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule." Congress has "the power to foster and protect interstate commerce, and to take all measures necessary and appropriate to that end, although intrastate transactions of interstate carriers may thereby be controlled." The court also found that section 3 of the Act vested the Commission with power to make the order in question. This decision is directly in line with the previous decisions of the court holding that interstate commerce is a unit subject in all its parts to Federal control.

§ 770. Discrimination by means of rate adjustments.

The rules against discrimination apply not only to rate schedules imposed for the first time, but also to all advances or reductions in rates. It is obvious that rates may be so related to each other that to change one without changing the others would necessarily result in an unjust discrimination.²⁶ Hence where rates are too low and an increase is justified, the advance should be made in such a manner as not to discriminate.²⁷ It is also recognized that rates may be advanced for the express purpose of equalizing rates in effect over other roads.²⁸ This interdependence of rates makes it necessary when passing upon the propriety of an increase in rates to inquire whether such

²⁶ *Davenport Commercial Club v. Y. & M. Ry. Co.*, 20 I. C. C. 19; *Lumbermen's Exchange of St. Louis v. A. & S. R. Ry.*, 24 I. C. C. 220. If rate from New York to C. F. A. points is discriminatory as compared with the rate to same points from Detroit, the adjustment may be rectified only by an increase in the

Detroit rate or a cut in the rate from New York. *Gotttron Bros. Co. v. G. & W. R. R. Co.*, 28 I. C. C. 38.

²⁷ *In re Advances on Ice*, 24 I. C. C. 660; *In re Advances on Oil*, 25 I. C. C. 349.

²⁸ *Omaha-Wisconsin Grain Rates*, 28 I. C. C. 602.

increase would result in an undue discrimination,²⁹ and a carrier may properly ask whether an enforced reduction to one point will not entail reductions to other points which it cannot afford to make.³⁰ But if the rates of an existing schedule do not bear a just or equitable relation to each other, the fact that advances or reductions would disturb the existing relation is not a conclusive argument against the change.³¹ On the other hand, the effect which a given rate, if ordered, will have upon the whole schedule of rates cannot be ignored by the Commission, and the consequences which it foresees may well cause it to hesitate to require a change. To a petition for the establishment of carload rating on cotton-piece goods between the Mississippi and Missouri rivers and not elsewhere, the Commission answered that to make such an order would throw out of balance the relation of rates on cotton-piece goods throughout the country—a consequence which it might well hesitate to incur.³² In such cases, therefore, the necessity for relief must be clear and imperative. In dealing with certain commodities, especially those of low grades, it has long been the custom of carriers to group a number of stations in a wide expanse of territory and place the whole under one rate.³³ This involves, of course, a considerable disregard of distance and varying degrees of inequality, but this is not of necessity unreasonable when the situation is viewed from every standpoint.³⁴ The chief justification of the practice lies in the fact that it places all producers in the group on the same footing at a market.³⁵ A group rate, however, must not be so arranged as to produce an undue discrimination. To place

²⁹ Grain Rates in C. F. A. Territory, 28 I. C. C. 549.

³⁰ Columbia Chamber of Commerce v. So. Ry., 28 I. C. C. 339.

³¹ Fairmont Creamery Co. v. A., T. & S. F. Ry., 28 I. C. C. 661.

³² Taylor Dry Goods Co. v. Mo. Pac. Ry., 28 I. C. C. 205.

³³ Kansas City Transportation Bureau v. A., T. & S. F. Ry., 16 I. C. C. 195; Moise Bros. Co. v. C., R. I. & P. Ry., 16 I. C. C. 550.

³⁴ Chicago Lumber & Coal Co. v. T. S. Ry., 16 I. C. C. 323.

³⁵ Ferguson Saw Mill Co. v. St. L., I. M. & S. Ry., 18 I. C. C. 396.

a point in a group to which it does not belong may prejudice it quite as substantially as a discrimination in the amount of the rate would do.³⁶ If this system is adopted it must be applied without discrimination to all places similarly situated.³⁷ Each case must, therefore, stand on its own merits,³⁸ and if it appears that the rate adjustment which was intended to do substantial justice between all shippers generally has resulted in individual instances in disproportionate inequality, it has failed of its purpose to that extent, and the arbitrary theory upon which it was built should yield sufficiently to prevent gross injustice.³⁹

§ 771. Conditions which are not dissimilar.

On the other hand, circumstances and conditions are not so dissimilar as to justify a preference because the city preferred has subscribed toward the building of the road,⁴⁰ or because it is much larger and has more important and extensive business interests than another,⁴¹ or because it is an assembling point,⁴² or because it possesses an option market,⁴³ or because it is a trade center.⁴⁴ The Commission has even held that the fact that a city is an important market should be a reason against rather than for discrimination in its favor.⁴⁵ Lack of proper policing at a transit point is not ground for the maintenance of rate

³⁶ *Corporation Commission of North Carolina v. N. & W. Ry.*, 19 I. C. C. 303, affirmed in *N. & W. Ry. v. United States*, 195 Fed. 953.

³⁷ *Columbia Grocery Co. v. L. & N. Ry.*, 18 I. C. C. 502.

³⁸ *Mushozee Traffic Bureau v. A., T. & S. F. Ry.*, 17 I. C. C. 169.

³⁹ *Alpha Portland Cement Co. v. B. & O. Ry.*, 22 I. C. C. 446.

⁴⁰ *Lincoln Board of Trade v. B. & M. Ry.*, 2 I. C. C. 95.

⁴¹ *Troy Board of Trade v. Ala. M.*

Ry., 4 I. C. C. 348, 6 I. C. C. 1; *Commercial Club of Duluth v. B. & O. Ry.*, 27 I. C. C. 639.

⁴² *Iowa State Board of Railroad Commissioners v. A. E. Ry.*, 28 I. C. C. 193.

⁴³ *Chamber of Commerce of New York v. N. Y. C. & H. R. Ry.*, 24 I. C. C. 55; *Payne-Gardner Co. v. L. & N. Ry.*, 19 I. C. C. 638.

⁴⁴ *Bowling Green Business Men v. L. & N. Ry.*, 24 I. C. C. 228.

⁴⁵ *In re Rates on Salt*, 24 I. C. C. 192.

discrimination against that point.⁴⁶ The financial inability of the defendant is no answer to a charge of undue preference,⁴⁷ nor the fact that its line is so long and circuitous that it is obliged to make rate concessions in order to share in the traffic.⁴⁸ It must be remembered that it is only dissimilarity in transportation conditions which justify preferential rates. Commercial and transportation conditions must not be confused. The condition of the market as to any specific commodity is not the controlling element.⁴⁹ So long as a rate is fair and just from the standpoint of service performed, the Commission may not take into account either the relative cost of production at competing points,⁵⁰ nor the price at which the shipper markets his product.⁵¹ Neither the amount of traffic involved,⁵² nor the size of a community,⁵³ nor the absence of competition between manufacturers can justify preferences and prejudices.⁵⁴ The fact that the complaining locality has advantages in other territory naturally tributary to it does not constitute a difference of condition which subjects it to discrimination in favor of localities not having those advantages.⁵⁵ In determining rates on imported goods, the Commission may not refuse to reduce them on the ground that to do so would give an advantage

⁴⁶ Indianapolis Freight Bureau v. C., C. & St. L. Ry., 26 I. C. C. 53.

⁴⁷ Brewer v. L. & N. Ry., 7 I. C. C. 224; Mayor & Council of Boston v. A. C. L. Ry., 24 I. C. C. 50.

⁴⁸ B. & A. Ry. v. B. & L. Ry., 1 Int. Com. Rep. 500, 1 I. C. C. 158.

⁴⁹ Bovaird Supply Co. v. A., T. & S. F. Ry., 13 I. C. C. 56.

⁵⁰ Colorado Coal Traffic Ass'n v. C. & S. Ry., 18 I. C. C. 572; Investigation of Alleged Unreasonable Rates on Meats, 22 I. C. C. 160; Empson Packing Co. v. C. M. Ry., 22 I. C. C. 268; Oklahoma Portland Cement Co. v. M., K. & T. Ry., 24

I. C. C. 158; Sheridan Chamber of Commerce v. C., B. & Q. Ry., 28 I. C. C. 250.

⁵¹ Oklahoma-Colorado Potato Rates, 28 I. C. C. 298.

⁵² Beach v. A. A. Ry., 26 I. C. C. 410.

⁵³ Harbor City Wholesale Co. of San Pedro v. So. Pac. Ry., 19 I. C. C. 323; Suffern Grain Co. v. I. C. Ry., 22 I. C. C. 178; In re Rates on Salt, 24 I. C. C. 192.

⁵⁴ Chamber of Commerce of Mason v. C., N. O. & T. P. Ry., 27 I. C. C. 263.

⁵⁵ Sioux City Commercial Club v. C. & N. W. Ry., 22 I. C. C. 110.

to foreign manufacturers on account of inadequate import duties.⁵⁶ The Act which it is the duty of the Commission to administer was not passed for the purpose of re-enforcing the tariff law in the matter of protection from foreign competitors.⁵⁷ Whatever it may be permissible for carriers to do for the favoring of industries or for granting them a larger measure of protection against foreign competition than Congress has given them, no such power may lawfully be exercised by the Commission.⁵⁸ Likewise the Commission has no authority to order the same rates on flour for export as on wheat for export for the purpose of placing American millers on a competitive equality with foreign millers, in the absence of legislation by Congress adopting such a national policy.⁵⁹ But on the other hand, if a town is recognized as an important trading center, and has gained and retained such recognition through undue discrimination, the position thus attained is not such a difference of circumstance as justifies preferential rates.⁶⁰ Carriers should keep in close touch with commercial conditions pertaining to sales of commodities and the needs of communities, and adjust their charges, as far as practicable, within reasonable limits, to meet those conditions and encourage trade and the movement of freight. But it cannot be held to be the duty of the carrier so to adjust its charges as to insure to a market the continuance of trade which it once enjoyed,⁶¹ nor to equalize the value of commodities in their final distribution,⁶² nor vary its own charges to accord with the differing values of the same commodity produced by different shippers.⁶³

⁵⁶ *Union Pacific Tea Co. v. Pennsylvania Ry.*, 14 I. C. C. 545.

⁵⁷ *In re Advances on Manganese Ore*, 25 I. C. C. 663.

⁵⁸ *A., T. & S. F. Ry. v. Interstate Commerce Commission*, 190 Fed. 591; *Southern Pac. Ry. v. Interstate Commerce Commission*, 219 U. S. 433, 55 L. ed. 283, 31 Sup. Ct. 288.

⁵⁹ *Bulte Milling Co. v. C. & A. Ry.*, 15 I. C. C. 351.

⁶⁰ *Payne-Gardner Co. v. L. & N. Ry.*, 13 I. C. C. 638.

⁶¹ *Baltimore Chamber of Commerce v. B. & O. Ry.*, 22 I. C. C. 596.

⁶² *Chicago Lumber & Coal Co. v. T. S. Ry.*, 16 I. C. C. 323.

⁶³ *Hafey v. St. L. & S. F. Ry.*, 15 I. C. C. 245.

§§ 772, 773] RAILROAD RATE REGULATION

§ 772. Dissimilarity of condition is a question of fact.

The question as to what in any particular case justifies a difference of rate is one of fact.⁶⁴ "As the third section of the Act, which forbids the making or giving any undue or unreasonable preference or advantage to any particular person or locality, does not define what, under that section, shall constitute a preference or advantage to be undue or unreasonable, and as the fourth section, which forbids the charging or receiving greater compensation in the aggregate for the transportation of like kinds of property for a shorter than for a longer haul over the same line, under substantially similar circumstances and conditions, does not define or describe in what the similarity or dissimilarity of circumstances and conditions shall consist, it cannot be doubted that whether, in particular instances, there has been an undue or unreasonable prejudice or preference, or whether the circumstances and conditions of the carriage have been substantially similar or otherwise, are questions of fact, depending on the matters proved in each case."⁶⁵ The amendment of the fourth section adopted in 1910 and the construction put upon it in the Intermountain Rate Cases (see *post*, sec. 783) make it even more clear that deviation from the rigid long-and-short-haul rule depends upon questions of fact to be determined by the Commission.

§ 773. Discrimination against points off the line.

When the question was first presented to the Commission as to whether a carrier could be held for discrimination against points not on its line, the Commission held with

⁶⁴ Shiras, J., in *Interstate Commerce Com. v. Alabama Midland Ry.*, 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. 45, B. & W. 433.

⁶⁵ Citing *Denaby Main Colliery Co. v. Manchester, &c., Ry. Co.*, 3 Rty. & Can. Cas. 426; *Phipps v. London & Northwestern Railway*,

2 Q. B. 229; *Cincinnati, N. O. & Tex. Pac. Ry. v. Interstate Commerce Commission*, 162 U. S. 184, 40 L. ed. 935, 16 Sup. Ct. 700; *Texas & Pacific Railway v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. ed. 940, 16 Sup. Ct. 666.

great positiveness: "It would be quite absurd to charge a railroad with giving a preference or advantage to a community which it does not serve, and it is equally illogical to say that it can prejudice or discriminate against such a community."⁶⁶ Some years later the Commission said: "A carrier cannot discriminate within the meaning of the statute except as between those whom it serves or whom it may lawfully be required to serve. It is not guilty of discrimination merely because it does not afford as favorable rates as others served in different territory, though the products carried by each are brought to the same market. The law does not deal in these matters with all carriers collectively as a single unit or system, but its commands are directed to each, with respect to the service which it is required to perform."⁶⁷ The unqualified stand here taken has long since been abandoned. A more guarded statement is that a carrier cannot be said to discriminate against a town which it does not reach and in whose carrying trade it does not participate.⁶⁸ The most frequently recognized exception to the rule with which the Commission started is found in the case of joint rates. An undue discrimination against a given point may be effected by a joint rate as easily as by a one-line rate; and if a carrier enters into a joint rate which results in discrimination which it could control, it is no less responsible than it would be if the discrimination were the result of a one-line rate.⁶⁹ Each carrier that participates in joint

⁶⁶ *Eau Claire Board of Trade v. C., M. & St. P. Ry.*, 4 Int. Com. Rep. 65. Even though the unqualified rule of this case has long since been abandoned, its language is frequently found in later decisions. See *Friend Paper Co. v. C., C. & St. L. Ry.*, 18 I. C. C. 178; *Utica Traffic Bureau v. N. Y. C. & H. R. Ry.*, 18 I. C. C. 271; *Schmidt & Sons v. Mich. Cent. Ry.*, 19 I. C. C. 535. But an examination of the facts in each case will

usually show that while the Commission still clung to the language of the *Eau Claire* case it had certain qualifications in mind.

⁶⁷ *Chicago Lumber & Coal Co. v. T. S. Ry.*, 16 I. C. C. 323.

⁶⁸ *Chamber of Commerce of Ashburn v. G. S. & F. Ry.*, 23 I. C. C. 140; *Blodgett Milling Co. v. C., M. & St. P. Ry.*, 23 I. C. C. 448.

⁶⁹ *Ashland Fire Brick Co. v. So. Ry.*, 22 I. C. C. 115; *Rates from the*

rates is responsible for the discrimination notwithstanding the fact that its rails do not extend to the point preferred.⁷⁰ That a carrier does not directly serve a city is no defense to a charge of undue discrimination where such carrier participates in the carrying trade of that city.⁷¹ On the other hand, the fact that the rails of a carrier extend both to the point alleged to be unduly preferred and to its rival is not conclusive evidence of a preference, since it is still open to the carrier to show that it does not in fact serve the point which it is claimed is favored.⁷² In short, the Commission looks at the facts of the traffic in question. If it appears that it is controlled by a carrier which is using its power to effect undue discriminations, then such carrier will be held responsible whether it has actual physical connection with the point in question or not. A carrier whose rails do not extend to a given city will be considered as having its rails extended thereto if it has trackage rights into it over the rails of another carrier or if it owns or controls a road that enters it.⁷³ If it is sought to fix responsibility upon a carrier for a preference resulting from a joint rate in which it participates, it must appear that the carrier entered into such joint rate voluntarily.⁷⁴ If the joint rate was forced upon it, as for instance by the order of a State commission, the Commission formerly held that the carrier was not responsible even though it profited by such rates,⁷⁵ but this has been

Walsenburg Coal Field, 26 I. C. C. 85.

⁷⁰ *Manufacturers & Merchants' Ass'n v. A. & A. Ry.*, 25 I. C. C. 116; *Galveston Commercial Ass'n v. A., T. & S. F. Ry.*, 25 I. C. C. 216; *Greenbaum Co. v. C. & O. Ry.*, 25 I. C. C. 352; *Southern Furniture Manufacturers' Ass'n v. So. Ry.*, 25 I. C. C. 379.

⁷¹ *Railroad Commission of Tennessee v. A. A. Ry.*, 17 I. C. C. 418; *Chamber of Commerce of Newport News v. So. Ry.*, 23 I. C. C. 345;

Chamber of Commerce of New York v. N. Y. C. & H. R. Ry., 24 I. C. C. 55; *La Grange Chamber of Commerce v. A. & W. P. Ry.*, 28 I. C. C. 178.

⁷² *Holland Blow Stave Co. v. A. C. L. Ry.*, 24 I. C. C. 81.

⁷³ *Commercial Club of Superior v. Gt. Nor. Ry.*, 24 I. C. C. 93.

⁷⁴ *Partridge & Sons Co. v. Penn. Ry.*, 26 I. C. C. 484.

⁷⁵ *Railroad Commission of Kansas v. A., T. & S. F. Ry.*, 22 I. C. C. 407.

reversed by the decision in the Shreveport case (sec. 769). On the other hand, a carrier which refuses to participate in rates to points not reached by its lines while participating in rates to other points similarly situated may be held for undue prejudice.⁷⁶ A carrier which enters into joint rates with other carriers by that act greatly curtails its own freedom of action. Thus it is undue prejudice for a carrier to deny to points on its lines a transit privilege at Chicago while participating in through rates under which other carriers grant such a privilege to complainants' competitors on their lines.⁷⁷

§ 774. What constitutes a through line.

To determine what constitutes a through line is not always an easy matter. A case which is much cited but which it is difficult to support is that of *Indiana Steel & Wire Co. v. C., R. I. & P. Ry.*⁷⁸ The facts were these: For a number of years, several carriers, forming an association known as the Arkansas Freight Committee, by tariffs duly published, maintained identical rates on steel and wire products from what was known as Chicago-Cincinnati territory. In 1907, without dissolving their association, they divided this territory at the Indiana-Illinois line, and established higher rates to the east of that line. Complaint having been made that this was discriminatory, the Commission held that by making their original grouping of territories, the carriers became bound to maintain reasonable and non-discriminatory rates throughout the group "without any regard to the line or lines of the carriers on which the shipment originates or over which it must pass from origin to destination. The identical through rates and joint rates from Chicago-Cincinnati territory to Arkansas common points were voluntarily established

⁷⁶ *Allentown Portland Cement Co. v. P. & R. Ry.*, 27 I. C. C. 448.

⁷⁷ *Van Natta Bros. v. C., C., C. & St. L. Ry.*, 23 I. C. C. 1.

⁷⁸ 16 I. C. C. 155. Followed in *Railroad Commission of Tennessee v. A. A. Ry.*, 17 I. C. C. 418.

by the defendants and formally maintained for many years prior to 1907 without complaint or question by shippers or carriers as to their reasonableness and justness. The carriers failed to show sufficient grounds for such advance in 1907, and they have wholly failed to show any sufficient or reasonable grounds for such advanced rates and changed regulations." Commissioner Knapp, who wrote the opinion in the Eau Claire case, dissented. The effect of this decision is that when traffic from two points of origin on different lines is carried to a point on a common connecting line under joint rates in a single tariff to which all three lines are parties, a through line or group of lines is formed which serves the whole territory covered by the rate schedule, and makes it possible for a carrier to discriminate against a point which is only constructively on its line. The Commission has frequently said that it cannot treat the railways of the country as a unit, but it takes a long step in that direction when it treats so large a group of them as a unit. The Commission has also added new terrors to joint traffic arrangements, by holding that all the lines participating in such agreements constitute for rate purposes one line.

§ 775. Equalization of economic advantages—Economic theory.

A theory of fixing rates which appeals to many economists and which is but a modification or special application of the rule for charging what the traffic will bear is the theory that rate making should be used to equalize the advantages which one locality may possess over another, in much the same way that advocates of a protective tariff argue that import duties should be used to equalize the cost of production. If a sea port is near the great grain-producing centers, other ports argue that this advantage of location should be overcome by such differentials as will enable them to obtain "their share" of the traffic. This theory, dangerous as it is from a legal standpoint,

has been accepted in some of the State courts. Thus in a Minnesota case, Judge Collins justified the railroad commission in prescribing an abnormally low rate for a long haul of coal as compared with other commodities and other distances upon commercial considerations of the sort above described, "namely, the application of principles when fixing rates which are forced upon common carriers by various conditions and circumstances and are in common practice among them,—a business policy which actuates and influences the carriers themselves to disregard a rule of strict comparison and strict equality as between bulk, or weight, or value as well as distance of carriage."⁷⁹ And in a Georgia case where the issue also was whether the railroad commission had acted irrationally in taking economic considerations into account in fixing the rate upon particular commodities between stations, Judge Evans said, "We do contend that the Commission, in the discharge of its duty to fix reasonable rates, is not precluded from the consideration of economic conditions recognized by the carriers in the conduct of their business. The full purpose of the creation of the Commission would be thwarted if it could not consider and act on every economic or industrial factor potentially influencing the operation of a railroad and the transportation of freight. It cannot act arbitrarily nor by edict produce abnormal conditions of trade; it cannot display favoritism by capriciously giving preferential rates to one locality which are denied to another. It may, however, recognize the traffic conditions between given points, and adjust its schedule to meet these conditions."⁸⁰ Even the Supreme Court of the United States has used language which seems to indicate a friendly feeling for this principle. In a case in which this was involved, it plainly appeared that the Interstate Commerce Commission had employed various

⁷⁹ *State v. Minneapolis & St. Louis Ry. Co.*, 80 Minn. 191, 83 N. W. 60. *Stove Wks.*, 128 Ga. 207, 57 S. E. 429.

⁸⁰ *Southern Ry. Co. v. Atlanta*

economic policies in fixing the relative rates in question. The lower Federal court held that the Commission had no power to lower through rates as between certain points and Mississippi river points and Denver, so as to give, for example, the Missouri river cities an artificial advantage over other points in shipments east of Denver, and Denver an advantage over Missouri river cities to points west of Denver.⁸¹ But the Federal Supreme Court reversed this decision and set forth this general principle: "The outlook of the Commission and its powers must be greater than the interest of the railroads or of that which may affect their interest. It must be as comprehensive as the interest of the whole country. If the problems which are presented to it therefore are complex and difficult, the means of solving them are as great and adequate as can be provided."⁸²

§ 776. Equalization of economic advantages—Legal practice.

However attractive this theory may be to the economists, it has little weight with lawyers who have been concerned with the making of rates. Both the Federal courts and the Commission recognize that it is as impossible for any tribunal to equalize the commercial advantages of localities as it is to equalize the intellectual powers of individuals.⁸³ The Interstate Commerce Act does not attempt to equalize fortunes, opportunities, or abilities.⁸⁴ In an early case, the Commission set forth the principles which, with some exceptions to be noted hereafter, it has ever since followed: "It is not the duty of carriers, nor is it proper that they undertake by adjustment of rates or otherwise to impair or neutralize the

⁸¹ *C., R. I. & P. Ry. v. Interstate Commerce Commission*, 171 Fed. 680.

⁸² *Interstate Commerce Commission v. C., R. I. & Pac. Ry.*, 218 U. S. 88, 54 L. ed. 946, 30 Sup. Ct. 65.

⁸³ *Brewer v. C. & G. Ry.*, 84 Fed. 268; *Interstate Commerce Commission v. L. & N. Ry.*, 118 Fed. 613.

⁸⁴ *Interstate Commerce Commission v. Diffenbaugh*, 222 U. S. 42; 32 Sup. Ct. 22, 56 L. ed. 83.

natural commercial advantages resulting from location or other favorable condition of one territory in order to put another territory on an equal footing with it in a common market. Each locality competing with others in a common market is entitled to reasonable and just rates at the hands of the carriers serving it and to the benefit of all its natural advantages. If this result in prejudice to one and advantage to another, it is not the undue prejudice or advantage forbidden by the Statute, but flows naturally from conditions *beyond the legitimate sphere of legal or other regulation.*" ⁸⁵ The Commission clearly recognizes not only the impossibility of equalizing natural advantages and commercial conditions and of placing all shipping points upon the same plane, but also that such a result would be unjust. Every locality is entitled to whatever advantages it possesses, whether they are due to nature or to the enterprise of its citizens.⁸⁶ Carriers, it is true, have

⁸⁵ Freight Bureau of the Cincinnati Chamber of Commerce v. C., N. O. & T. P. Ry., 6 I. C. C. Rep. 195, 4 Int. Com. Rep. 592. See to the same effect, Crews v. R. & D. Ry., 1 Int. Com. Rep. 703, 1 I. C. C. 401; James & M. Buggy Co. v. C., N. O. & T. P. Ry., 3 Int. Com. Rep. 682, 4 I. C. C. Rep. 744; Raworth v. Northern Pac. Ry., 3 Int. Com. Rep. 857, 5 I. C. C. Rep. 234; Eau Claire Board of Trade v. C., M. & St. P. Ry., 4 Int. Com. Rep. 65, 5 I. C. C. Rep. 264; Commercial Club v. C., R. I. & P. Ry., 6 I. C. C. Rep. 647; Commercial Club of Omaha v. C., R. I. & P. Ry., 6 I. C. C. Rep. 675; Freight Bureau v. C., N. O. & T. P. Ry., 7 I. C. C. Rep. 180; Danville v. So. Ry., 8 I. C. C. Rep. 409; Wichita v. Mo. Pac. Ry., 10 I. C. C. Rep. 35; C. Y. P. Ass'n v. V. S. & P. Ry., 10 I. C. C. Rep. 193; Washburn-Crosby Co. v. Penn. Ry., 11 I. C. C. 40; Valley Flour Mills v. A., T. & S. F. Ry., 16 I. C. C. 73;

Acme Cement Plaster Co. v. L. S. & M. S. Ry., 17 I. C. C. 30; Corporation Commission of N. C. v. N. & W. Ry., 19 I. C. C. 303; Wichita Falls System Joint Coal Rate Cases, 26 I. C. C. 215; Rates on Linseed Oil, 26 I. C. C. 265; West Virginia Rail Co. v. B. & O. Ry., 26 I. C. C. 622; Missouri River-Illinois Wheat and Flour Rates, 27 I. C. C. 286; Aransas Pass Channel & Dock Co. v. G. H. & S. A. Ry., 27 I. C. C. 403; Board of Trade of Chicago v. C. & A. Ry., 27 I. C. C. 530; Lebanon Commercial Club v. L. & N. Ry., 28 I. C. C. 301; Traffic Ass'n of St. Louis Coffee Importers v. I. C. Ry., 28 I. C. C. 484; Bryant Co. v. Ft. W. & D. C. Ry., 28 I. C. C. 594.

⁸⁶ In the following cases the Commission emphasizes the impropriety of any attempt on its part to deprive a place of its natural advantages. Saginaw Board of Trade v. G. T. Ry., 17 I. C. C. 128; Carstens Packing Co.

often given great weight to commercial considerations in the fixing of rates,⁸⁷ and the Commission might require such rates, when voluntarily established, to be maintained, but it will not initiate rates upon that theory.⁸⁸ Nor will it require a carrier which has by rate adjustment as to one commodity enabled a manufacturer or producer to overcome a natural disadvantage of location to establish a like adjustment as to another commodity.⁸⁹ On the other hand, the fact that a locality possesses advantages not enjoyed by its rivals does not deprive it of its right to a reasonable rate, nor justify any discrimination against it.⁹⁰ But in the view of the Commission, whatever advantages are possessed by a city which tend to give it lower rates or superior service cannot be ignored.⁹¹ What constitutes a reasonable rate depends in part upon the natural situation of a city,⁹² and it is the purpose of the Act to secure to it a rate which in view of all the circumstances and conditions is reasonable and non-discriminatory. Every locality is entitled to such a rate as of right, and also to whatever business it can obtain under it.⁹³ A shipper in choosing a

v. O. & W. Ry., 22 I. C. C. 77; *Chamber of Commerce of New York v. N. Y. C. & H. R. Ry.*, 24 I. C. C. 55; *Commercial Club of Superior v. G. N. Ry.*, 24 I. C. C. 96; *In re Advances on Cooperage*, 24 I. C. C. 656; *In re Wool, Hides, and Pelts*, 25 I. C. C. 185; *In re Mine Rating*, 25 I. C. C. 286; *Wichita Board of Trade v. A., T. & S. F. Ry.*, 25 I. C. C. 625; *Chamber of Commerce of Beaumont v. T. & N. O. Ry.*, 25 I. C. C. 695; *Furniture Rates in the Northwest*, 26 I. C. C. 655; *Transcontinental Rates from Group F.*, 28 I. C. C. 1. See also *State v. Adams Express Co.*, 171 Ind. 138, 85 N. E. 337.

⁸⁷ *City of Spokane v. No. Pac. Ry.*, 19 I. C. C. 162.

⁸⁸ *Douglas & Co. v. C., R. I. & P. Ry.*, 21 I. C. C. 541; *International*

Agricultural Corporation v. L. & N. Ry., 22 I. C. C. 488.

⁸⁹ *Globe Milling Co. v. C., M. & St. P. Ry.*, 24 I. C. C. 594.

⁹⁰ *Hecker-Jones-Jewell Milling Co. v. B. & O. Ry.*, 14 I. C. C. 356; *Sioux City Commercial Club v. C. & N. W. Ry.*, 22 I. C. C. 110; *Massee & F. Lumber Co. v. So. Pac. Ry.*, 23 I. C. C. 110; *Indianapolis Freight Bureau v. C., C. & St. L. Ry.*, 26 I. C. C. 53.

⁹¹ *Kindel v. N. Y., N. H. & H. Ry.*, 15 I. C. C. 555; *Saginaw Board of Trade v. G. T. Ry.*, 17 I. C. C. 128.

⁹² *Chamber of Commerce of Newport News v. So. Ry.*, 23 I. C. C. 345.

⁹³ *Receivers' & Shippers' Ass'n of Cincinnati v. C., N. O. & T. P. Ry.*, 18 I. C. C. 440.

locality takes it with all its advantages and disadvantages,⁹⁴ and these in turn determine to some extent the commercial and transportation facilities which the carrier may confer upon it.⁹⁵ But the natural disadvantages of a place should not be magnified unduly nor allowed to obscure its right to reasonable rates.⁹⁶ On the other hand, the carrier must not for its own purposes disregard the natural advantages of a locality and bar it from competing with other places. Thus, when a carrier makes rates to two competing markets, which give the one monopoly over the other, because it can secure reshipments from the favored locality and none from the other, it goes beyond serving its fair interest, and disregards the statutory requirement of relative equality as between persons, localities, and particular descriptions of traffic.⁹⁷ And so inequality in treatment of shippers and localities is indefensible where it has no other justification than the diversion by the carrier of through traffic from a shorter route over which it participates in carriage, so as to secure for itself greater aggregate revenue through a long haul by a different route, over which it is also engaged in transportation.⁹⁸ Nor may railways create artificial differences in market conditions by an arbitrary differential in rates, whereby the product of one section of the country is assigned to one market, and the product of another section of the country to another market.⁹⁹

§ 777. Discrimination against the staple industry of a locality.

Prejudice against the locality may arise from rates

⁹⁴ *In re Advances in Rates, Western Case*, 20 I. C. C. 307; *In re Investigation of Rates on Meats*, 22 I. C. C. 160; *Globe Milling Co. v. C., M. & St. P. Ry.*, 24 I. C. C. 594.

⁹⁵ *City of Spokane v. No. Pac. Ry.*, 21 I. C. C. 400.

⁹⁶ *Board of Trade of Carrollton v. C. & G. Ry.*, 28 I. C. C. 154.

⁹⁷ *Savannah Bureau of Freight & Transportation v. L. & N. Ry.*, 8 I. C. C. Rep. 377.

⁹⁸ *C. F. & I. Co. v. So. Pac. Ry.*, 6 I. C. C. Rep. 488.

⁹⁹ *In re Export Rates from Points East and West of Mississippi River*, 8 I. C. C. Rep. 185.

which while not directed against any particular place have the result of injuring a staple industry of a place. Thus section 3 is violated and Chicago is prejudiced by an unduly high relative rate on live hogs as against packing house products;¹ but where the rate is caused by genuine competition between carriers and where the result of the rate complained of has not been to change the volume of traffic or materially affect the business of the complainant, it is not unduly discriminatory.² Duluth is prejudiced by higher rates on shingles than on lumber.³ Kansas and Missouri river points are prejudiced by a differential against corn products in favor of corn.⁴ So the localities in Official Classification Territory wherein hay and straw are produced were discriminated against by the act of several carriers in advancing those commodities from the sixth to the fifth class and thereafter charging fifth-class rates for transportation.⁵

§ 778. Equalization of values.

While a difference in rates may be made by reason of difference in value, it should not be so great as to equalize the difference in value in the ultimate market of the commodities carried. In a recent case the Federal court set aside the order of the Commission on the ground that the similarity of circumstances and conditions under which a service of carriage is rendered, which under the Act, requires an equality of rate, relates only to the circumstances and conditions which affect the service. And it was consequently held that where different coal mining localities are grouped into a district for rate-making purposes, a

¹ *Chicago Board of Trade v. Chicago & A. R. R.*, 3 Int. Com. Rep. 233, 4 I. C. C. 158; *Chicago L. S. Exch. v. Chicago G. W. Ry.*, 10 I. C. C. Rep. 428.

² *Interstate Commerce Commission v. C. G. W. Ry.*, 209 U. S. 108, 28 Sup. Ct. 493, 52 L. ed. 705, affirming 141 Fed. 1003.

³ *Duluth Shingle Co. v. D. S. S. & A. Ry.*, 10 I. C. C. Rep. 489.

⁴ *Board of Railway Commissioners v. A., T. & S. F. Ry.*, 8 I. C. C. Rep. 304; *In re Rates on Corn & Corn Products*, 11 I. C. C. Rep. 212.

⁵ *National Hay Ass'n v. L. S. & M. S. Ry.*, 9 I. C. C. Rep. 264.

carrier is not justified in making a different rate for the same or substantially similar service from a particular locality in such district or on the product of a particular mine or vein, from that charged others.⁶ That the difference in the product from such locality, mine, or vein and that from other mines in the district is such that it can pay a higher rate and still compete in the market is not material in this regard. The Commission will not attempt to equalize differences in the cost of production, whether natural or artificial.⁷ And when market quotations on grain were offered to show the advantages enjoyed by Omaha over Kansas City it said, "There is no difference in the intrinsic value of like grain in the two markets, and it is not within our province to adjust rates merely to equalize market conditions."⁸

§ 779. Disproportionate charges inconsistent with public duty.

It is the belief of the writer that the public service law will not be satisfied in the end unless with some reasonable degree of certainty each applicant who requires a service is charged his proportion of the total cost, including in that cost, over and above all current and fixed charges, a fair return upon proper capitalization. It must be admitted that the law relating to disproportion is still in the making; it is as indefinite as the law relating to discrimination was twenty-five years ago. By the weight of authority a generation ago, there was no law whatever against discrimination as such. As has been seen in a previous chapter at the beginning of this book, if in those days each applicant for the same service was quoted a rate reasonable in itself, all was then well; although outrageous differences even at that time might be evidence that the higher rate was unreasonable. In the same way to-day,

⁶ *Philadelphia & R. Ry. Co. v. Interstate Commerce Commission*, 174 Fed. 687.

⁷ *Andy's Ridge Coal Co. v. So. Ry.*, 18 I. C. C. 405.

⁸ *Omaha Grain Exchange v. C., R. I. & P. Ry.*, 28 I. C. C. 680.

very probably by the weight of authority, there is no law against disproportion as such. Provided each applicant for different service is quoted a rate which is reasonable in itself, it may be that there is no redress by established law, however outrageous the disproportion may be; although it seems to be agreed that outrageous differences may be evidence that the higher rate is unreasonable in itself. And yet it is quite in the line of the evolution of the public service law that a rule against disproportion as such may eventually be recognized, despite the fact that it might interfere with the business policies of the public service companies even more than the present rule against outright discrimination has done. For the same principles which forbid any differences when the conditions are the same, should prohibit disproportionate differences when the conditions are different.

Topic D. Long and Short Haul

§ 780. Long and short haul at common law.

The question as to whether a carrier may charge less for a long haul than for a short one included therein is but one phase of the general problem as to whether there is any legal requirement that rates shall be relatively reasonable. Whether a lower charge for a longer haul be justifiable or not, there are many cases in which it would be hard in the absence of legislation to prevent it. In the case of carriage of goods, it appears to be clear abstractly that the owner may demand that his goods shall be delivered up to him at any point on the journey, provided it is reasonably easy for the carrier to comply with the demand. It is of course possible for a railroad to run freight trains through without stopping from one end to the other of the long haul, and thus defeat the demand of the owner to have his goods at the intermediate point; and it is also in its power so to make up the train that it will be difficult to drop goods directed to the end of the route at a way station. This being the case, it is not difficult in the case of goods

to defeat the demand of an owner for the delivery of his goods short of their destination; and as a practical matter, therefore, a lower charge for a longer haul may be enforced. On the other hand, it should be said that the common law has thus far been concerned only with the absolute reasonableness of rates. If the charge to the intermediate point is not inherently unreasonable the shipper cannot complain because a more remote point has a more favorable rate. While it is possible that any discrimination by a carrier against either a person or a locality may in time come under the ban of the common law, it cannot be said that discrimination against localities is at present so regarded.

§ 781. Legal justification of lower long-haul rate.

As a matter of reasonableness the charge has still to be justified at common law; but this may be done in some cases. If competition is met at one point and not at another, a competitive rate is established at the former point. A railroad whose line runs through the non-competitive to the competitive point must at the latter point either meet the competitive rate or lose all business. It must of course give up the business rather than carry at a loss, and throw upon the remaining traffic the burden of supporting the road and also of making up the loss. But the competitive rate is ordinarily slightly remunerative; it yields a net income, though less than is necessary to pay its proportion of the fixed charges. If the business is given up, all the fixed charges must be paid by the traffic at the non-competitive points; if the competitive rate is met and business obtained, the profit from the business will go to reduce the amount of fixed charges to be paid by the non-competitive traffic. As the competitive traffic will not pay its share of the fixed charges, the non-competitive traffic, having more than its share of the fixed charges to bear, will necessarily pay a rate higher than the competitive rate in proportion to the distance;

and it may well be obliged to pay absolutely a higher rate than the competitive rate for a longer haul. Nevertheless, the rate will be lower than it would be if the railroad did not meet the competitive rate and obtain its share of the business; and therefore, being the lowest rate which the carrier can charge and obtain fair compensation, it is reasonable at common law.

§ 782. Statutory regulations of long and short-haul rates.

The charge by a carrier of a less rate between two points than is charged for carriage from the same initial point to an intermediate point on the same route seems at first sight indefensible upon any legal basis. Nevertheless such rates have always been common in every railroad schedule and are still vigorously defended. Such discrimination flourished practically without any real check during the period when no rule against any discrimination was recognized, but its seeming unfairness has led to the passing of statutes in many jurisdictions forbidding the charging of less for a long haul than for a short haul one included therein. The chief of these is the Interstate Commerce Act of 1887, which not only forbade all discriminatory charges, but in a separate section (section 4) expressly forbade charging less for a long haul than for a short one included in it when "under substantially similar circumstances and conditions."† This section also provided, however, that upon application by the carrier the Commission might authorize a less charge for the longer haul. But the carriers set up the contention that such an application need be made to the Commission only when the two hauls were made "under substantially similar circumstances and conditions," and that any circumstances which seemed to them to constitute a dissimilarity of condition which would justify a discriminatory charge operated *ipso facto* to exempt them from the restraints of this section and authorized them to give preferential rates. Thus the carrier decided primarily whether the two hauls

were under similar conditions, leaving to the Commission only such authority over the rates established as was conferred upon it by the second and third sections of the Act.⁹ This construction of the Fourth Section was adopted both by the Commission¹⁰ and by the Supreme Court.¹¹ In so holding they were no doubt influenced by the fact that the English Act, on which this clause was based, had been so construed by the English courts.¹² Thereafter the power of the Commission to grant exemption from the rule of equality set up in the Act became practically useless,¹³ and application was made to it only in extraordinary cases, such as the failure of crops¹⁴ and the sudden rush to the Klondike.¹⁵ Of course, the decision of the carrier as to the existence of a dissimilarity of circumstance and condition was subject to review by both the Commission and the courts, but if the carrier had established a rate which, even though discriminatory, was one

⁹ The philosophy of the Act as expressed by Judge Shiras in *Van Patten v. Chicago, M. & St. P. Ry.*, was that competition would reduce the rates to a fair amount at all competitive points, and that the Fourth Section would then keep the rates at non-competitive points down to the level of the competitive rates. The courts, however, finally decided, in view of the limitation of the section to cases where the conditions were substantially similar, that competition with other railroads would justify a lower rate for the longer haul, and as practically all cases of the sort before the passage of the Act had been due to the competition of other railways, this decision in effect qualified the whole section.

¹⁰ In *re L. & N. Ry.*, 1 I. C. C. 31, 1 Int. Com. Rep. 278. But the Commission abandoned this view in *Georgia Railroad Commission v. Clyde S. S. Co.*, 5 I. C. C. Rep. 324.

¹¹ *Interstate Commerce Commission v. A., T. & S. F. Ry.*, 50 Fed. 295; *Interstate Commerce Commission & C., N. O. v. T. P. Ry.*, 56 Fed. 925; *Behlmer v. L. & N. Ry.*, 71 Fed. 835; *Interstate Commerce Commission v. Ala. Mid. Ry.*, 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. 45; *L. & N. Ry. v. Behlmer*, 175 U. S. 648, 44 L. ed. 309, 20 Sup. Ct. 209; *E. T., V. & G. Ry. v. Interstate Commerce Commission*, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. 516.

¹² A good account of the working of the Fourth Section before the amendment of 1910 may be found in *City of Spokane v. No. Pac. Ry.*, 21 I. C. C. 400.

¹³ *Phipps v. London & N. W. Ry.*, 1892, 2 Q. B. 299.

¹⁴ *Re F. E. & M. V. Ry.*, 6 I. C. C. Rep. 293; *World's Fair, Re R. W. & O. Ry.*, 6 I. C. C. Rep. 328.

¹⁵ *Re A., T. & S. F. Ry.*, 7 I. C. C. Rep. 593.

which the fourth section authorized, it could not be condemned as illegal, for what the law authorizes cannot be unlawful. It was evident, however, that this construction of the Act vested in the carrier the power to make a primary decision on a question which was essentially public in its nature.¹⁶ From the standpoint of public policy, this was not a desirable situation.

§ 783. The Fourth Section Amendment of 1910.

The result reached by the construction placed upon the fourth section in its original form was so far from the legislative intent that in 1910 the section was amended by the omission of the phrase as to similarity of circumstances and conditions, and at the same time the maximum through rate was fixed at an amount not to exceed the sum total of the intermediate rates. This is an unyielding rule from which there can be no relief even though the existence of water competition be proved.¹⁷ Neither may it be evaded through the establishment of blanket rates, for these are subject to the limitation that from no part of the group covered by them may a lower rate be constructed on a combination of locals.¹⁸ It was also provided that if rates were reduced in order to meet water competition, the carrier might not increase the rates unless the Commission should find that such proposed increase rests upon some change of condition other than the elimination of water competition, but it has been held that the suspension of lake navigation during four months of the year is not an "elimination of water competition" within the meaning of the Act.¹⁹ The Commission has also held

¹⁶ *T. & P. Ry. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. ed. 940, 16 Sup. Ct. 666.

¹⁷ *National League of Commission Merchants of U. S. v. A. C. L. Ry.*, 20 I. C. C. 132.

¹⁸ *Hydraulic Press Brick Co. v. Vandalia Ry.*, 15 I. C. C. 175.

¹⁹ *American Insulated Wire & Cable Co. v. C. & N. Ry.*, 26 I. C. C. 415. This clause does not apply to rate reductions made before June 18, 1910. *Westbound Lake-and-Rail, Knit Goods Commodity Rates*, 32 I. C. C. 54.

that the fact that because of the likelihood of water competition, a carrier makes a rate which may not be compensatory, does not of itself render unreasonable and unjust an increase to a remunerative basis.²⁰ The effect of this amendment is to shift from the carrier to the Commission the power to decide as a primary question whether circumstances justifying a discriminatory long-haul rate exist. This construction of the section was attacked by the carriers, who also set up that if it was correct then this section as amended was unconstitutional. But in June, 1914, the Supreme Court decided against the carriers on both points,²¹ and it may now be taken as established that a less charge for a long haul than for a short one included therein is absolutely prohibited unless first authorized by the Commission.²² Notwithstanding this change in the provisions of the fourth section it would seem that decisions of the Commission and of the courts previous to 1910 as to when the carrier would be justified in departing from the provisions of the Act would still be of value in ascertaining the rules of law by which the Commission must be governed in giving effect to this clause. Dissimilarities alleged by the carriers and sustained by the Commission or the courts prior to the amendment of 1910 will presumably be sufficient to convince the Commission that a less charge for a longer haul should be allowed. This is all the more true since the Commission in making an order under the fourth section is not exercising a new and additional authority over undue discrimination, but is only using a power which it already had under section 3.²³ The significance of the fourth section lies not in any increase in the author-

²⁰ Scrap-Iron Rates between Duluth and Chicago, 28 I. C. C. 467.

²¹ Intermountain Rate Cases, 234 U. S. 476, 58 L. ed. 1408, 34 Sup. Ct. 986.

²² Colorado Coal Traffic Ass'n v. C. & S. Ry., 19 I. C. C. 478; Railroad

Commission of Nevada v. So. Pac. Ry., 21 I. C. C. 329; City of Spokane v. No. Pac. Ry., 21 I. C. C. 400.

²³ City of Spokane v. No. Pac. Ry., 21 I. C. C. 400.

ity of the Commission, but in the rigid limitation placed upon the carriers in the making of rates.

§ 784. General principles governing the Fourth Section.

It was the intent of Congress to put a stop to this form of discrimination prohibited in section 4 in so far as that could properly be done.²⁴ An absolute prohibition of that kind of preference is within the power of Congress,²⁵ and could not be complained of unless the carrier's property was being confiscated.²⁶ But the Commission itself, although the opportunity has frequently been presented to it, has never indorsed a rigid long-and-short-haul section. Indeed, the present provision is drawn along lines which received its tentative approval.²⁷ As the Act now stands, discrimination in rates in favor of a more distant point and against a less distant intermediate one is absolutely forbidden until it has been authorized by the Commission. But the power of the Commission is confined to authorization. Such discriminations, even though in the public interest, cannot be required. They can be made only on the initiative of the carrier.²⁸ But the fourth section of the Act, unlike the second and third sections, applies only to discriminatory charges for transportation. Demurrage and similar charges are not included in it.²⁹ No question can arise under section 4 unless the rate to the farther distant point is less than the rate to an intermediate point.³⁰ Inasmuch as section 4 deals only with the one form of discrimination, which is governed by rules peculiar to it, it may be violated under a state of facts not con-

²⁴ *In re Lumber Rates*, 25 I. C. C. 50.

²⁵ *In re Application of Southern Pacific Ry.*, 22 I. C. C. 336.

²⁶ *Railroad Commission of Nevada v. South. Pac. Ry.*, 21 I. C. C. 329.

²⁷ *Ib.* 335.

²⁸ *Thatcher v. Fitchburg Ry.*, 1 Int. Com. Rep. 356.

²⁹ *Pennsylvania Millers' State Ass'n v. P. & R. Ry.*, 8 I. C. C. Rep. 531.

³⁰ *Milk Producers' Ass'n v. D., L. & W. Ry.*, 7 I. C. C. Rep. 92; *Wheeling Corrugating Co. v. B. & O. Ry.*, 18 I. C. C. 125; *League &c. v. Oregon Short Line*, 18 I. C. C. 562.

stituting a violation of section 3.³¹ The Act permits but does not authorize the carrier to make the same charge for a long haul as for a short one included in it.³² But it expressly provides that the aggregate charge for the long haul shall never be greater than the sum total of the intermediate rates.³³ In determining whether this provision of the Act has been observed, the Commission does not look at the lowest possible combination of intermediate fares, but at the lowest combination of fares that are published and filed as available for interstate travel or in making up interstate fares. If a carrier wishes to exclude from this consideration any of its purely intrastate fares, it must refrain from publishing and filing them as available for use in making up interstate fares.³⁴ The charge for the long haul must not be unreasonably low,³⁵ nor must that for the short haul be unreasonably high.³⁶

§ 785. Relation between long-haul and short-haul rates.

As rates to the long-distance point are frequently determined by factors beyond the carrier's control, it is difficult to fix any exact relation between such rates and those to an intermediate point. This element in the situation is, however, not to be altogether disregarded, and the Commission has tried to meet it by holding that the intermediate rate should not exceed the long-distance rates plus a reasonable local charge from the more remote point back to the intermediate point,³⁷ and should perhaps, in

³¹ In re Suspension of Rates on Packing-House Products, 21 I. C. C. 68.

³² Kellogg Toasted Corn Flake Co. v. M. C. Ry., 24 I. C. C. 604.

³³ Arabol Mfg. Co. v. S. B. Ry., 25 I. C. C. 429.

³⁴ Conference Ruling, 298.

³⁵ Kimberly v. C. & O. Ry., 17 I. C. C. 335. A rate otherwise reasonable is not shown to be unduly low by the presence in the carrier's tariff of

a higher rate for a shorter distance involving a violation of the Fourth Section. Adjustment should be made with respect to the latter rate. Iowa-Minnesota Cement Rates, 28 I. C. C. 477.

³⁶ Southern Timber & Land Co. v. So. Pac. Ry., 18 I. C. C. 232.

³⁷ Monroe Progressive League v. St. L., I. M. & S. Ry., 15 I. C. C. 534; Valley Flour Mills v. A., T. & S. F. Ry., 16 I. C. C. 73.

some cases, be even less.³⁸ This may be determined largely by the amount of the traffic involved. Differentials above rates to basing points may be higher where long-haul traffic to local stations is meager.³⁹ Especially is the carrier estopped from complaining when the Commission, in establishing a new schedule of rates, merely maintains the same ratio of difference which the carrier itself had made.⁴⁰ Under the fourth section as amended in 1910 the Commission may prescribe the maximum difference in rates which may be made against the intermediate point, or may fix a rate at the more distant point below which the carrier must not go, or may define the territory from which a higher intermediate charge may be made.⁴¹ When the Commission has established an inherently reasonable rate to a given point, a carrier may not charge a higher rate to an intermediate point.⁴² Likewise if a carrier publishes for interstate use a combination of local State rates which in the aggregate is lower than the through charge authorized by the Commission, the rule of section four must be observed unless permission to the contrary has been obtained from the Commission.⁴³ The carrier must make changes in its schedule with due regard to the provisions of the fourth section. Hence an increase of rates to intermediate points may necessitate advances in rates to more distant points in order to avoid a violation of the fourth section.⁴⁴ But a carrier may not bring its schedules into conformity with the fourth section by changes in classification, nor by cancellation of a commodity rate leaving a class rate or a combination rate

³⁸ Bluefield Shippers' Ass'n v. N. & W. Ry., 22 I. C. C. 519.

³⁹ Board of Trade of Carrollton v. C. of G. Ry., 28 I. C. C. 154.

⁴⁰ Interstate Commerce Commission v. Un. Pac. Ry., 222 U. S. 541, 56 L. ed. 308, 32 Sup. Ct. 108.

⁴¹ City of Spokane v. N. P. Ry., 21 I. C. C. 400.

⁴² City of Spokane v. N. P. Ry., 19 I. C. C. 162.

⁴³ Iowa State Board of R. R. Commissioners v. A. E. Ry., 28 I. C. C. 563.

⁴⁴ Transcontinental Rates from Group F., 28 I. C. C. 1; Kansas-Iowa Brick Rates, 28 I. C. C. 285; Nassau Advancement Ass'n v. C. & N. W. Ry., 28 I. C. C. 459.

to apply, nor by cancellation of a rate with provision that in lieu thereof a rate in some other tariff shall apply, nor by correction of error in the tariff, nor by addition or elimination of routes without change in the list of participating carriers, nor by any other change which does not leave the rate, fare, or charge in substantial compliance with the law.⁴⁵

§ 786. Interpretation of the Fourth Section.

In applying the fourth section to the cases that come before it for adjudication, the Commission is obliged to determine many questions of fact. The primary purpose of the fourth section is to protect intermediate points against discrimination growing out of the giving of relatively more favorable rates to points farther distant. The interests of the more remote point were thought to be sufficiently protected by the competitive conditions which it enjoyed, and the prohibition of a higher rate to the intermediate point it was hoped would automatically give that point a share in the competitive advantages of its more distant rival. Such being the object of this provision, it is obvious that if a point is not an intermediate one, it cannot avail itself of the protection of the fourth section. It is also clear that the Commission cannot exercise jurisdiction unless all the points involved lie in the United States. If either the intermediate or the more remote point is in a foreign country, the fourth section cannot apply.⁴⁶ The usual case presents no difficulty, but it has been held that a point on a branch line is not an intermediate one,⁴⁷ while a point on a lateral line⁴⁸ or on a subsidiary line of the same system but without physical connection with the main line may be.⁴⁹ But a com-

⁴⁵ Conference Ruling, 293.

⁴⁶ Conference Ruling, 318.

⁴⁷ *Baer Brothers Mercantile Co. v. Mo. Pac. Ry.*, 13 I. C. C. 329; *Milwaukee Electric Co. v. C., M. & St. P. Ry.*, 15 I. C. C. 468. See also Conference Ruling, 304, *e. f.*

⁴⁸ *American Coal Co. v. B. & O. Ry.*, 17 I. C. C. 149.

⁴⁹ *Nebraska State Railway Commission v. C., B. & Q. Ry.*, 23 I. C. C. 121; *Lewis v. C., B. & Q. Ry.*, 25 I. C. C. 97.

plaining point is not necessarily an intermediate one within the meaning of the fourth section when the traffic to the more remote point moves by a route not usually taken by traffic to the complaining point.⁵⁰ Neither does a carrier violate the Act when it maintains a joint rail-lake-and-rail rate higher than the rail-and-lake rate to the more distant point if the lake boats do not stop at the complaining point.⁵¹ On the same principle it was held that there was no violation of section 4 when a lesser rate was charged on bananas from New Orleans to Burlington, Iowa, than to Kansas City, Mo., and intermediate points, since the joint rate quoted by way of Kansas City was merely a "paper" rate on which traffic did not move, the bananas destined for Burlington being shipped by way of St. Louis.⁵² So also a merely theoretical or paper rate, not used and unknown to the defendant until casually discovered, will not be accepted as affording a just basis for an order for reparation on shipments made to an intermediate point at a slightly higher rate.⁵³ The actual facts of traffic rather than the relative physical position of two points is the test as to whether one is intermediate as regards the other. But on the other hand it has been held in a State court interpreting a similar statute that where a railroad company charges higher rates for carrying freight a less distance than its published rates for carrying it a greater distance in the same direction over the same road, it violates the law, even though it does not actually carry any freight the greater distance.⁵⁴

§ 787. Application of the Fourth Section.

It should be noted that the long-and-short haul rule of

⁵⁰ Merchants' Freight Bureau of Little Rock v. Mo. Pac. Ry., 21 I. C. C. 573.

⁵¹ City of Ashland v. N. Y. C. & H. R. Ry., 20 I. C. C. 2.

⁵² Topeka Banana Dealers' Ass'n v. St. L. & S. F. Ry., 11 I. C. C. 620.

⁵³ Missouri & Kansas Shippers' Ass'n v. M., K. & T. Ry., 12 I. C. C. 483.

⁵⁴ Seawell v. Kansas City, F. S. & M. Ry., 119 Mo. 222, 24 S. W. 1002. Compare McGrew v. Missouri P. Ry., 177 Mo. 533, 76 S. W. 995.

the fourth section applies only to traffic over the same line or route in the same direction. If there are two lines between two points,—one direct and the other circuitous,—can an intermediate point on the direct line complain of a lower rate by the circuitous line? The Commission finds little merit in the contention that lower rates should be made over circuitous lines.⁵⁵ Traffic should be allowed to seek its natural avenues and should not be forced into roundabout and indirect routes,⁵⁶ but nevertheless, discrimination based on this factor has been sustained.⁵⁷ What is a circuitous line is a question of fact to be determined in each case, but the Commission has held that a line 103 miles or 15 per cent longer than the direct line is a circuitous line.⁵⁸ Whether a haul is longer or shorter should be determined by the length of the shortest route in each case.⁵⁹ When a point has shown that it is intermediate within the meaning of the fourth section, it must then show that it is subject to a higher rate than a more distant point. This is a simple question of mathematics, but in the process comparison may be made only between rates of the same kind,—that is, import rates are to be compared only with import rates, export rates with export rates, transshipment rates with transshipment rates, proportional rates with proportional rates, and excursion, commutation, mileage, party rate and half fares are to be compared only with fares of the same character.⁶⁰ And where two connecting carriers have united in a joint tariff,

⁵⁵ *Transcontinental Rates from Group F*, 28 I. C. C. 1.

⁵⁶ *Rates on Cotton Seed and Its Products*, 28 I. C. C. 219.

⁵⁷ *McCullough v. L. & N. Ry.*, 25 I. C. C. 48; *In re Lumber Rates*, 25 I. C. C. 50; *Edwards & Bradford Lumber Co. v. C., B. & Q. Ry.*, 25 I. C. C. 93.

⁵⁸ *In re Rates on Salt*, 24 I. C. C. 192; *Edwards & Bradford Lumber Co. v. C., B. & Q. Ry.*, 25 I. C. C. 93.

⁵⁹ *Ulric v. L. S. & M. S. Ry.*, 9 I. C. C. Rep. 495. See also *Hill v. N. C. & St. L. Ry.*, 6 I. C. C. Rep. 343; *Milwaukee Chamber of Commerce v. C., M. & St. P. Ry.*, 7 I. C. C. Rep. 481.

⁶⁰ *Baltimore Chamber of Commerce v. B. & O. Ry.*, 22 I. C. C. 596; *Southern Illinois Millers' Ass'n v. L. & N. Ry.*, 23 I. C. C. 672; *In re Lumber Rates*, 25 I. C. C. 50; *Conference Rulings*, 299b, 304a, 310.

they form for the connected roads a new and independent line, and the through tariff on the joint line is not the standard by which the separate tariff of either company is to be measured in determining whether such separate tariff violates the long-and-short-haul clause.⁶¹ But in case of suit brought all participating carriers should be joined.⁶²

§ 788. Principles governing deviation from the Fourth Section.

The Act, both in its original form and in the amendment of 1910, recognized the necessity of making exceptions to a rigid long-and-short-haul rule, and accordingly the Commission was empowered to authorize a less charge for a long haul than for a shorter one included in it. The obvious intent of Congress was defeated, however, by the unfortunate phrasing of the original Act. The clause "under substantially similar circumstances and conditions" was so construed as to deprive the Commission of the most important part of its power in the matter. By the amendment of 1910 this clause was removed from the Act, and there can now be no rate discrimination in favor of a more distant or against an intermediate point unless it is authorized by the Commission. The Act itself gives no hint as to what considerations will justify such exceptions. The whole matter is left to the discretion of the Commission subject of course to review by the courts.⁶³ But even in its original form the exceptions made by the carriers were subject to review by the Commission and by the courts, and this body of decisions, which is quite considerable in amount, affords much light as to the principles by which the Commission is guided. Each case, however,

⁶¹ *Chicago & N. W. Ry. v. Osborne*, 52 Fed. 912, 3 C. C. A. 347, reversing *Osborne v. Chicago & N. W. Ry.*, 48 Fed. 49, and *Junod v. Chicago & N. W. Ry.*, 47 Fed. 290; *United States v. Mellen*, 53 Fed. 229; *Imperial Coal*

Co. v. P. & L. E. Ry., 2 Int. Com. Rep. 436.

⁶² *Moise Brothers' Co. v. C., R. I. & P. Ry.*, 16 I. C. C. 550.

⁶³ *Intermountain Rate Cases*, 234 U. S. 476, 58 L. ed. 1408, 34 Sup. Ct. 986.

is in a sense a law unto itself, and must stand upon its own facts. No situation can furnish an exact precedent for another.⁶⁴ In passing upon applications for relief from the operation of the fourth section, the Commission must take into consideration the whole situation from the standpoint of both carrier and shipper,⁶⁵ and while the existence of a wrong cannot of itself justify its continuance, the Commission must nevertheless be guided to some extent by conditions as it finds them.⁶⁶ While the clause as to dissimilarity of circumstances and conditions was omitted from the Act by the amendment of 1910, it is on the ground of such dissimilarity that the Commission usually grants exemption from the rule of section 4, but in so doing the Commission considers not only whether the circumstances and conditions at the two points are unlike, but also whether the dissimilarity justifies a deviation from the long-and-short-haul clause.⁶⁷ The burden of showing this is on the carrier,⁶⁸ and if it presents no defense for its violation of the fourth section, it must remove the discriminations complained of.⁶⁹

§ 789. Recognition of carrier's right to relief.

The Commission now views discrimination between intermediate and long-distance points more leniently than it did before the adoption of the amendment of 1910. Formerly it regarded with disfavor the maintenance of a lower rate for a longer haul than for a shorter one included within the longer, and the circumstances and conditions obtaining at the more distant point which were relied upon to justify it must not only be clearly shown to exist, but

⁶⁴ Bluefield Shippers' Ass'n v. N. & W. Ry., 22 I. C. C. 519.

⁶⁵ City of Spokane v. No. Pac. Ry., 21 I. C. C. 400.

⁶⁶ Bluefield Shippers' Ass'n v. N. & W. Ry., 22 I. C. C. 519.

⁶⁷ Heileman Brewing Co. v. C., M. & St. P. Ry., 16 I. C. C. 396; City of

Spokane v. No. Pac. Ry., 21 I. C. C. 400.

⁶⁸ Carstens Packing Co. v. Oregon Short Line Ry., 17 I. C. C. 324; Transcontinental Commodity Rates, West Bound, 26 I. C. C. 456.

⁶⁹ Commercial Club of Duluth v. B. & O. Ry., 27 I. C. C. 639.

also to exercise a potent or controlling influence in compelling the lower rate.⁷⁰ But it now holds that its power is not to be exercised arbitrarily, and that it is under a duty to permit a higher intermediate charge whenever the resulting rates will not contravene the Act because of injustice, unreasonableness, or undue discrimination.⁷¹ It is the function of the Commission to ascertain whether the facts set up by the carrier in justification of its discriminatory rates really exist. If they do, the Commission recognizes that the carrier may claim relief from the fourth section as of right. Even the fact that adherence to the fourth section would entail only a slight loss of revenue to the carrier is held to be no reason for denying it relief.⁷² In determining this question it takes into account both the prejudice against the intermediate point and the rate which it is required to pay.⁷³ It must also appear that the long-distance rate was not voluntarily reduced by the carrier, but was forced down.⁷⁴ If the applicant for relief controls the long-distance rate and can determine what effect shall be given to conditions which are supposed to justify the reduction at the farther point, then the Commission may also decide whether the carrier is justified in giving to those conditions the effect which it does, and may fix the extent to which those conditions may influence the carrier's rates.⁷⁵

§ 790. Conditions justifying relief from the Fourth Section.

Whenever a carrier discriminates in favor of a point in

⁷⁰ *Bovaird Supply Co. v. A., T. & S. F. Ry.*, 11 I. C. C. 56. *S. F. Ry. v. United States*, 191 Fed. 856.

⁷¹ *Railroad Commission of Nevada v. So. Pac. Ry.*, 21 I. C. C. 329; *Bluefield Shippers' Ass'n v. N. & W. Ry.*, 22 I. C. C. 519. That it is the duty of the Commission to allow higher intermediate rates when it would not result in a violation of any other section of the Act is also the view of the courts. *A., T. &*

⁷² *In re Lumber Rates*, 25 I. C. C. 50.

⁷³ *In re Application of Southern Pacific Co.*, 22 I. C. C. 366.

⁷⁴ *Grand Junction Chamber of Commerce v. D. & R. G. Ry.*, 23 I. C. C. 115.

⁷⁵ *Bluefield Shippers' Ass'n v. N. & W. Ry.*, 22 I. C. C. 519; *Bowling*

order to meet circumstances and conditions not of its own creation, and whenever such discrimination seems reasonable and necessary, it may be justified in claiming relief from the fourth section.⁷⁶ But it must clearly appear that it is differences in transportation conditions and not the vicissitudes of shippers which produced the difference in rates.⁷⁷ Rate schedules may not be constructed for the purpose of alleviating individual misfortune growing out of bad business judgment or unfavorable commercial conditions.⁷⁸ But in applying the Act the Commission should take into account whatever would properly be regarded by the carrier apart from the provisions of the Act as matters which warranted differences in charges.⁷⁹ But the fact that there is a greater market for a commodity at the longer than at the shorter distance point does not create a substantial dissimilarity of circumstances and conditions,⁸⁰ nor do joint tariffs nor an arrangement by the carriers with a wagon transportation company extending through lines to points not reached by railway.⁸¹ One of the most important factors is the cost of the service rendered. From this standpoint the long haul possesses some inherent advantages over the short haul. There are certain fixed charges which are the same regardless of the length of the haul, and the greater its length the less the charge per ton-mile will be.⁸² The same is true of passenger service.⁸³ It is also obvious that traffic can be more cheaply handled per ton-mile in a densely populated

Green Business Men v. L. & N. Ry.,
24 I. C. C. 228.

⁷⁶ Pittsburgh Plate Glass Co. v.
P., C., C. & St. L. Ry., 13 I. C. C. 87.

⁷⁷ Ponchatoula Farmers' Ass'n v.
I. C. Ry., 19 I. C. C. 513.

⁷⁸ Florida Fruit & Vegetable Ass'n
v. A. C. L. Ry., 17 I. C. C. 552, 22
I. C. C. 11; Railroad Commission of
Kansas v. A., T. & S. F. Ry., 22
I. C. C. 407.

⁷⁹ Pittsburgh Plate Glass Co. v.

P., C., C. & St. L. Ry., 13 I. C. C.
87.

⁸⁰ Fewell v. R. & D. Ry., 7 I. C. C.
Rep. 354.

⁸¹ Cary v. Eureka Springs Ry., 7
I. C. C. Rep. 286.

⁸² Indianapolis Freight Bureau v.
C., C., C. & St. L. Ry., 15 I. C. C.
504.

⁸³ Commercial Club of Salt Lake
City v. A., T. & S. F. Ry., 19 I. C. C.
218.

region where the volume of traffic is large than in a thinly settled region where the fixed charges must be borne by a smaller amount of business.⁸⁴ Differences in the physical configuration of the country may also render the operation of one part of a line so expensive as to justify a higher charge. The elimination of grades, larger trainloads, and increased car capacity may affect rates.⁸⁵ All these factors may favor or even justify a deviation from the fourth section. But something more than difference in cost of service must usually be found. The Commission has held that that alone is not a sufficient justification,⁸⁶ although it has also held that whenever a schedule is established for a one-line haul, certain arbitraries should be allowed for a two-line haul, since the cost of service is greater and the carrier should be allowed to charge more.⁸⁷

§ 791. Competition as ground for relief from the Fourth Section.

The chief argument offered by the carriers as justifying a departure from the long-and-short-haul rule is the existence of competition at the farther distant point.⁸⁸ Where this is clearly shown,⁸⁹ and where the competition is real and substantial,⁹⁰ and where no relief seems available to the carrier except a reduction in rates,⁹¹ this argument is persuasive.⁹² The competition may be in the

⁸⁴ *Memphis Freight Bureau v. F. S. & W. Ry.*, 11 I. C. C. 1.

⁸⁵ *Meeker & Co. v. L. V. Ry.*, 21 I. C. C. 129.

⁸⁶ *Grand Junction Chamber of Commerce v. D. & R. G. Ry.*, 23 I. C. C. 115.

⁸⁷ *Ontario Iron Ore Co. v. N. Y. C. & H. R. Ry.*, 21 I. C. C. 204; *Iowa State Board of Railroad Commissioners v. A. E. Ry.*, 28 I. C. C. 563.

⁸⁸ A more detailed consideration of competition as a factor justifying relief from the Fourth Section will be found in secs. 792-802.

⁸⁹ *Interstate Commerce Commission v. Ala. Mid. Ry.*, 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. 45.

⁹⁰ *E. T., V. & G. Ry. v. Interstate Commerce Commission*, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. 516.

⁹¹ *Iowa Grain Rates*, 28 I. C. C. 354.

⁹² Decisions holding that competition justifies a departure from the rule of the Fourth Section are too numerous for citation. Among them are the following: *Interstate Commerce Commission v. Alabama Midland Ry.*, 168 U. S. 144, 42 L. ed.

transportation of one commodity only, e. g., coffee, and such competition does not require a competitive rate on other commodities, and in some circumstances would not justify such a rate.⁹³ But while the facts of each case may present peculiarities which have an important bearing on the result, it is now well settled that a circuitous line may deviate from the rule of the fourth section where it does so to meet the competition of a direct line, provided that the higher intermediate rate is still a reasonable rate.⁹⁴ It is equally well settled that land carriers may reduce

414, 18 Sup. Ct. 45, B. & W. 433; *East Tenn., V. & G. Ry. v. Interstate Commerce Commission*, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. 516; *Interstate Commerce Commission v. Clyde S. S. Co.*, 181 U. S. 29, 45 L. ed. 729, 21 Sup. Ct. 512; *Interstate Commerce Commission v. Louisville & N. R. R.*, 190 U. S. 273, 47 L. ed. 1047, 23 Sup. Ct. 687; *Ex parte Koehler*, 31 Fed. 315; *Interstate Commerce Commission v. A., T. & S. F. Ry.*, 50 Fed. 295; *Interstate Commerce Commission v. W. & A. Ry.*, 88 Fed. 186; *Interstate Commerce Commission v. Southern Ry.*, 105 Fed. 703; *Interstate Commerce Commission v. Southern Ry.*, 122 Fed. 800; *Bovaird Supply Co. v. A., T. & S. F. Ry.*, 11 I. C. C. 56; *Rocky Hill Buggy Co. v. Southern Ry.*, 11 I. C. C. Rep. 229; *Phillips-Trawick-James Co. v. So. Pac. Ry.*, 11 I. C. C. 644; *Pecos Mercantile Co. v. A., T. & S. F. Ry.*, 13 I. C. C. 173; *Johnston & Son Dry Goods Co. v. A., T. & S. F. Ry.*, 13 I. C. C. 388; *City of Spokane v. No. Pac. Ry.*, 15 I. C. C. 376; *Foster Lumber Co. v. G. C. & S. F. Ry.*, 17 I. C. C. 385; *Paragon Plaster Co. v. N. Y. C. & H. R. Ry.*, 19 I. C. C. 480; *Nebraska Material Co. v. C., B. & Q. Ry.*, 20 I. C. C. 89; *In re Investigation of*

Advances in Rates on Grain, 21 I. C. C. 22; *City of Spokane v. No. Pac. Ry.*, 21 I. C. C. 400; *In re Transportation of Wool, Hides and Pelts*, 23 I. C. C. 151; *Bowling Green Business Men v. L. & N. Ry.*, 24 I. C. C. 228; *Lebanon Commercial Club v. L. & N. Ry.*, 25 I. C. C. 277. But in interpreting similar language in the Constitution of Kentucky, sec. 218, the court held that competition at the terminus of the long haul does not prevent the carriage from being under substantially similar circumstances and conditions. *L. & N. Ry. v. Commonwealth*, 106 Ky. 633.

⁹³ *Traffic Association of St. Louis Coffee Importers v. I. C. Ry.*, 28 I. C. C. 484.

⁹⁴ Among the numerous decisions are the following: *Wright Wire Co. v. P. & L. E. Ry.*, 21 I. C. C. 64; *Gile & Co. v. So. Pac. Ry.*, 22 I. C. C. 298; *In re Rates on Salt*, 24 I. C. C. 192; *McCullough v. L. & N. Ry.*, 25 I. C. C. 48; *In re Lumber Rates*, 25 I. C. C. 50; *Edwards & Bradford Lumber Co. v. C., B. & Q. Ry.*, 25 I. C. C. 93; *In re Southern Ry.*, 25 I. C. C. 407; *National Refrigerator & Butchers' Supply Co. v. St. L., I. M. & M. Ry.*, 26 I. C. C. 524; *Thomas Iron Co. v. Penn. Ry.*, 28 I. C. C. 608.

their rates at long distance points in order to meet water competition,⁹⁵ but this does not authorize them to reduce their rates so far as to suppress water competition;⁹⁶ nor are they free to meet water competition in whatever way and at whatever point and to whatever extent they see fit.⁹⁷ Market competition, growing out of the efforts of rival carriers to transport to a given center from various points of origin on their respective lines commodities which compete for the market of that center, must always be considered when it exists, and may indeed be the determining factor in an application for a deviation from the rule of the fourth section.⁹⁸ Competition however is so easily alleged, and so easily made to appear, and assumes so many elusive forms that applications based upon it must be carefully scrutinized in order to prevent fraud.

Topic E. Competition as a Factor in Rate Making

§ 792. Competition as a justification for discrimination.

Few questions come before the Commission with greater

⁹⁵ Water competition is the justification relied upon in innumerable cases. Among them are the following: *Darling & Co. v. B. & O. Ry.*, 15 I. C. C. 79; *City of Spokane v. No. Pac. Ry.*, 15 I. C. C. 376; *Rogers v. Oregon Ry. & Nav. Co.*, 16 I. C. C. 424; *Bayou City Rice Mills v. T. & N. O. Ry.*, 18 I. C. C. 490; *Steinfeld & Co. v. I. C. Ry.*, 20 I. C. C. 12; *American Cigar Co. v. P. & R. Ry.*, 20 I. C. C. 81; *Fruit Growers' Ass'n v. A. C. L. Ry.*, 20 I. C. C. 190; *International Salt Co. v. G. & W. Ry.*, 20 I. C. C. 530; *In re Transportation of Wool, Hides & Pelts*, 23 I. C. C. 151; *Escanaba Business Men's Ass'n v. A. A. Ry.*, 24 I. C. C. 11; *Bowling Green Business Men v. L. & N. Ry.*, 24 I. C. C. 228; *Railroad Commissioners of Oregon v. So. Pac. Ry.*, 24 I. C. C. 273; *Southwestern Ship-*

pers' Traffic Ass'n v. A., T. & S. F. Ry., 24 I. C. C. 570; *In re Lumber Rates*, 25 I. C. C. 50; *Gillis & Son v. P. B. & W. Ry.*, 26 I. C. C. 61; *Gotttron Bros. Co. v. G. & W. Ry.*, 28 I. C. C. 38; *Meridian Board of Trade v. A. G. S. Ry.*, 28 I. C. C. 360; *New England Investigation*, 28 I. C. C. 560.

⁹⁶ *Texarkana Freight Bureau v. St. L., I. M. & S. Ry.*, 28 I. C. C. 569.

⁹⁷ *City of Spokane v. No. Pac. Ry.*, 19 I. C. C. 162.

⁹⁸ *Indianapolis Freight Bureau v. C., C. & St. L. Ry.*, 16 I. C. C. 276; *Railroad Commission of Kansas v. A., T. & S. F. Ry.*, 22 I. C. C. 407; *In re Rates on Salt*, 24 I. C. C. 192; *Kellogg Toasted Corn Flake Co. v. M. C. Ry.*, 24 I. C. C. 604; *In re Lumber Rates*, 25 I. C. C. 50.

frequency than the effect which competition may be allowed to have in justification of discriminating rates. This is not considered in determining questions of discrimination under section 2,⁹⁹ but it is involved in both the third and fourth sections of the Act. The third section forbids "any undue or unreasonable preference or advantage" to any person or place or description of traffic, while the fourth section absolutely prohibits a lower charge for a long haul than for a shorter one included therein unless it has first been authorized by the Commission. In suits under both sections the carriers have availed themselves of the existence of competition at a given point as an argument for sustaining their rates to that point:—under the third section as a defense against a charge of undue discrimination, and under the fourth section as justifying relief from the operation of this rigid long-and-short-haul rule. The question therefore as to what competition will justify a discriminatory rate is almost constantly before the Commission, and while certain general principles have been developed in dealing with it, the question is still primarily one of fact which must be settled anew in each case as it arises. In the application of the third and fourth sections to a specific state of facts, one important distinction between the two sections presents itself at the outset. When a complaint alleging undue discrimination under the third section comes to the Commission for adjudication, the Commission finds the alleged discrimination in existence as an accomplished fact, and the burden of proving its unlawfulness rests on him who complains of it. But under the fourth section as amended in 1910, no discrimination of the kind there prohibited can be put into operation until the consent of the Commission has first been obtained. And the burden of justifying the discrimination lies with the carrier who seeks that consent. In a close case this shifting in the burden of proof may be the determining

⁹⁹ In re Advances on Manganese Ore, 25 I. C. C. 663.

factor. On the other hand, it must be recognized that the third section is much more elastic than the fourth, and there might be a violation of the rigid rule of the fourth section under a state of facts which would not constitute a violation of the third section,¹ but a discrimination which can be justified under section 4 is never a violation of section 3.²

§ 793. Competition as a factor in rate making.

It is now well settled that competition at a given point is a dissimilarity of conditions which may justify a lower rate than to other points which are in all other respects similarly situated. The Commission has always allowed this to be shown, but it was with much reluctance that it followed the precedents of the English courts and accepted it as a complete justification. Now, however, both the Commission and the courts regard competition with favor as a circumstance to be encouraged, and allow it to have whatever effect it can be shown to have in the making of rates.³ It has even been asserted that the carrier has a "natural right" to make his rates low enough to meet

¹ Kellogg Toasted Corn Flake Co. v. M. C. Ry., 24 I. C. C. 604.

² Bovaird Supply Co. v. A., T. & S. F. Ry., 11 I. C. C. 56.

³ This doctrine is now so well established by a multitude of decisions that specific citations are unnecessary. In the following cases, competition was sustained as a dissimilarity of condition which justified a less charge for a long haul before the adoption of the Amendment of 1910. Cincinnati, N. O. & T. P. Ry. v. Interstate Com. Comm., 162 U. S. 184, 40 L. ed. 935, 16 Sup. Ct. 700; Texas & P. Ry. v. Interstate Com. Comm., 162 U. S. 197, 40 L. ed. 940, 16 Sup. Ct. 666; Interstate Com. Comm. v. Alabama Mid. Ry., 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct.

45, B. & W. 433; Louisville & N. Ry. v. Behlmer, 175 U. S. 648, 44 L. ed. 309, 20 Sup. Ct. 209; East Tenn., V. & G. Ry. v. Interstate Com. Comm., 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. 516; Interstate Com. Comm. v. Clyde S. S. Co., 181 U. S. 291, 45 L. ed. 866, 21 Sup. Ct. 512. In addition to the above cases, while in various stages below, see: Missouri Pac. Ry. v. Texas & P. Ry., 31 Fed. 862; Ex parte Koehler, 31 Fed. 315; Interstate Com. Comm. v. Atchison, T. & S. F. Ry., 50 Fed. 295; Interstate Com. Comm. v. Southern Ry., 105 Fed. 703. It should be noted also that all parts of a joint rate may be affected by competition. Interstate Commerce Commission v. C., P. & V. Ry., 124 Fed. 624.

those of his competitor,⁴ and it is well recognized that a carrier may for competitive reasons establish a rate lower than it could justly be compelled by the Commission to establish.⁵ In thus accepting on a comparatively small volume of traffic moving to a given point exceptionally low comparative rates, which it must establish in order to secure any part of the traffic, a carrier does not thereby estop itself from charging reasonably remunerative rates to other points to which it hauls the volume of the traffic from which it must derive the principal part of its revenues.⁶ Nor do carriers which accord competing localities the same rates to a particular point obligate themselves to grant to them the same rates to other points where they do not compete.⁷ So far indeed have the courts and the Commission gone as to treat it almost as a matter of judicial knowledge that in fixing certain rates the carrier had practically no choice, but must make rates which would meet those of its competitors, or else withdraw from that traffic altogether. Thus the Commission recognizes that the rates from the Atlantic ports to Asia are the result of the rivalry of the transcontinental roads and the Suez and Panama canals,⁸ while the rates fixed by the railways on traffic between the Atlantic and Pacific coasts are controlled by the steamship lines operating by way of Panama.⁹ Rates from the North Atlantic ports to the

⁴ *Indianapolis Freight Bureau v. C., C. & St. L. Ry.*, 26 I. C. C. 53.

⁵ *Indianapolis Freight Bureau v. Pa. Ry.*, 15 I. C. C. 567; *Breeze-Trenton Mining Co. v. W. Ry.*, 19 I. C. C. 598; *Evens & Howard Fire Brick Co. v. St. L., I. M. & S. Ry.*, 25 I. C. C. 141; *Sioux City Terminal Elevated Railroad Co. v. C., M. & St. P. Ry.*, 27 I. C. C. 457.

⁶ *Railroad Commission of Kentucky v. L. & N. Ry.*, 13 I. C. C. 300.

⁷ *Colorado Coal Traffic Ass'n v. C. & S. Ry.*, 18 I. C. C. 572.

⁸ *China and Japan Trading Co. v. Georgia Ry.*, 12 I. C. C. 236; *Enterprise Manufacturing Co. v. Georgia Ry.*, 12 I. C. C. 451.

⁹ *City of Spokane v. No. Pac. Ry.*, 15 I. C. C. 376; *Kentucky Wagon Mfg. Co. v. I. C. Ry.*, 18 I. C. C. 360; *Taylor Dry Goods Co. v. Missouri Pac. Ry.*, 28 I. C. C. 205; *Keats Auto Co. v. O. R. R. & N. Co.*, 28 I. C. C. 412. See re-opened *Intermountain Rate Cases*, I. C. C., Feb. 11, 1915.

south are fixed by water routes,¹⁰ while those to the middle west are determined by the existence of the competition of the Great Lakes.¹¹ Cleveland, Toledo, Detroit and Duluth possess competitive conditions which cannot be ignored in the making of rates,¹² while St. Louis, Memphis and Vicksburg are equally indebted to the Mississippi.¹³ The Commission has repeatedly indicated that rates to Minneapolis, St. Louis and Memphis are the result of acute competitive conditions,¹⁴ while it was held that competition at Louisville justified a variance in rate according to the grade of coal, while at a neighboring non-competitive point one rate was applied to all grades.¹⁵ But while the Commission and the courts are ready to allow to competition whatever weight it can be shown to have in the making of rates, the question always remains what weight does competition actually have in this particular case. This is a question of fact, in the determination of which decisions in other cases are of little help. The Commission, however, has held that it is not enough to show merely the existence of actual or potential competition.¹⁶ Its character must be examined and its bearing upon the making of rates must be determined. If carriers rely upon competition as a justification for a discriminatory adjustment of rates, they must show not only the

¹⁰ *Receivers' & Shippers' Ass'n of Cincinnati v. C., N. O. & T. P. Ry.*, 18 I. C. C. 440; *Atlanta Journal Co. v. S. A. L. Ry.*, 28 I. C. C. 186.

¹¹ *Board of Trade of Chicago v. A. C. Ry.*, 20 I. C. C. 504; *International Salt Co. v. G. & W. Ry.*, 20 I. C. C. 530; *Wisconsin State Millers' Ass'n v. C. N. & St. P. Ry.*, 23 I. C. C. 494; *Gotttron Bros. Co. v. G. & W. Ry.*, 28 I. C. C. 38.

¹² *Saginaw Board of Trade v. G. T. Ry.*, 17 I. C. C. 128.

¹³ *Anadarko Cotton Oil Co. v. A., T. & S. F. Ry.*, 20 I. C. C. 43.

¹⁴ *Business Men's League of Albert*

Lea v. B. & O. Ry., 24 I. C. C. 125; *Lumbermen's Exchange of St. Louis v. A. & S. R. Ry.*, 24 I. C. C. 220; *Holland Blow Stave Co. v. A. C. L. Ry.*, 24 I. C. C. 81; *Merchants' Freight Bureau of Little Rock v. A., T. & S. F. Ry.*, 26 I. C. C. 543; *Boston Chamber of Commerce v. A., T. & S. F. Ry.*, 28 I. C. C. 230; *Traffic Bureau of Nashville v. L. & N. Ry.*, 28 I. C. C. 533.

¹⁵ *Lebanon Commercial Club v. L. & N. Ry.*, 28 I. C. C. 301.

¹⁶ *Chamber of Commerce of Newport News v. Southern Ry.*, 23 I. C. C. 345.

fact but the reason for it. If there is no reason outside the mere whim of their traffic managers, then the roads must bear the burden of the poor company in which they find themselves at competitive points.¹⁷ It must also be shown that the competition was sufficient to justify a difference in rates,¹⁸ and that the rate differential established is not greater than the competition warranted.¹⁹ It must furthermore appear that the competition is genuine,²⁰ and was not created nor is it controlled by the carrier.²¹ The existence of competition at a favored point is no defense to a charge of undue prejudice when similar competitive conditions exist at the place prejudiced.²² The agency or instrument used by the competing carrier is immaterial. The competition may be by rail,²³ or by

¹⁷ *E. T., V. & G. Ry. v. the Interstate Com. Comm.*, 99 Fed. 52; *Suffern Grain Co. v. I. C. Ry.*, 22 I. C. C. 178.

¹⁸ *City of Spokane v. No. Pac. Ry.*, 21 I. C. C. 400.

¹⁹ *Grain Shippers' Ass'n v. I. C. Ry.*, 8 I. C. C. Rep. 158; *Holdskom v. M. C. Ry.*, 9 I. C. C. Rep. 42; *Marten v. L. & N. Ry.*, 9 I. C. C. Rep. 581; *Gardner v. So. Ry.*, 10 I. C. C. Rep. 342; *Merschom, S. P. & Co. v. Central Ry.*, 10 I. C. C. Rep. 456; *Lehmann-Higginson Grocery Co. v. A., T. & S. F. Ry.*, 10 I. C. C. Rep. 460; *Planters' Gin & Compress Co. v. Y. & M. V. Ry.*, 16 I. C. C. 131; *Sondheimer v. I. C. Ry.*, 17 I. C. C. 60.

²⁰ *Int. Com. Comm. v. C. G. W. Ry.*, 209 U. S. 108.

²¹ *Chamber of Commerce of Ashburn v. G. S. & F. Ry.*, 23 I. C. C. 140; *Bowling Green Business Men's Ass'n v. L. & N. Ry.*, 24 I. C. C. 228. A higher rate on lumber shipped from southern territory to Des Moines over that shipped to Omaha and Council Bluff cannot be justified on the

ground that Omaha is "an important dumping ground" for lumber, where it appears that such dumping ground results from the very difference in rates complained of. *Greater Des Moines Committee v. C. G. W. Ry.*, 14 I. C. C. 294.

²² *Mayor and Council of Boston v. A. C. L. Ry.*, 24 I. C. C. 50; *Mfrs. & Merchants' Ass'n v. A. & A. Ry.*, 24 I. C. C. 331; *Board of Trade of Morristown v. A. C. L. Ry.*, 24 I. C. C. 372; *In re Advances on Barley*, 24 I. C. C. 664; *Mfrs. & Merchants Ass'n v. A. A. Ry.*, 25 I. C. C. 116; *North Fork Cannel Coal Co. v. Ann Arbor Ry.*, 25 I. C. C. 241; *Southern Furniture Mfrs. Ass'n v. So. Ry.*, 25 I. C. C. 379.

²³ *Randolph Lumber Co. v. S. A. L. Ry.*, 11 I. C. C. 601; *Wright Wire Co. v. P. & L. E. Ry.*, 21 I. C. C. 64; *Indianapolis Freight Bureau v. C., C. & St. L. Ry.*, 23 I. C. C. 195; *Chamber of Commerce of New York v. N. Y. C. & H. R. R.*, 24 I. C. C. 55; *Bahrenburg Bros. & Co. v. A. C. L. Ry.*, 24 I. C. C. 560; *City of Crawford v. C. & N. W. Ry.*, 25 I. C. C.

boat,²⁴ or by wagon,²⁵ or by a trolley car.²⁶ It has even been held that water competition is created by floating ties down a river,²⁷ and that circumstances are dissimilar at a city served by break-bulk boats and by car ferry as compared with a city not so served.²⁸ Within certain limits express rates and freight rates compete, and to that extent express rates should be established with reference to freight rates.²⁹ Express rates in turn are affected by the competition of the post office, which shows itself in the disproportionate charges for large and small packages.³⁰ Whether the competing carrier is subject to the Act is immaterial.³¹

§ 794. Incidents of competition.

When it is once established that substantial competition

259; Philadelphia Veneer Lumber Co. v. C. Ry. of N. J., 25 I. C. C. 653; Coke Producers Ass'n of Connells-ville v. B. & O. Ry., 27 I. C. C. 125; Indianapolis Freight Bureau v. C., C., & St. L. Ry., 28 I. C. C. 53; Omaha Grain Exchange v. C., R. I. & P. Ry., 28 I. C. C. 680.

²⁴ Enterprise Mfg. Co. v. Georgia Ry., 12 I. C. C. 130; Montgomery Freight Bureau v. L. & N. Ry., 17 I. C. C. 521; Receivers' & Shippers' Ass'n of Cincinnati v. C., N. O. & T. P. Ry., 18 I. C. C. 440; Industrial Lumber Co. v. St. L., W. & G. Ry., 19 I. C. C. 50; Truck Growers' Ass'n v. A. C. L. Ry., 20 I. C. C. 190; Georgetown Ry. & Light Co. v. N. & W. Ry., 22 I. C. C. 144; South Atlantic Waste Co. v. So. Ry., 22 I. C. C. 293; Escanaba Business Men's Ass'n v. A. A. Ry., 24 I. C. C. 11; In re Advances on Flaxseed, 25 I. C. C. 337; Rates on Knitting-factory Products, 25 I. C. C. 634; Arkansas Fertilizer Co. v. St. L., I. M. & S. Ry., 25 I. C. C. 645; Merchants Freight Bureau of Little Rock v. A., T. & S. F. Ry., 26 I. C. C.

543; Texarkana Freight Bureau v. St. L., I. M. & S. Ry., 28 I. C. C. 569; LaGrange Chamber of Commerce v. A. & W. P. Ry., 28 I. C. C. 178; Meridian Board of Trade v. A. G. S. Ry., 28 I. C. C. 360; Wausau Advancement Ass'n v. C. & N. W. Ry., 28 I. C. C. 459.

²⁵ Santa Rosa Traffic Ass'n v. So. Pac. Ry., 24 I. C. C. 46; Baker Commercial Club v. O. W. R. R. & N. Co., 25 I. C. C. 281.

²⁶ Elgin Commercial Club v. B. & M. Ry., 28 I. C. C. 380.

²⁷ Preston v. C. & O. Ry., 19 I. C. C. 406.

²⁸ Escanaba Business Men's Ass'n v. Ann Arbor Ry., 24 I. C. C. 11.

²⁹ Kindel v. Adams Express Co., 11 I. C. C. 475.

³⁰ Sandford v. Western Express Co., 16 I. C. C. 32; In re Express Rates, 24 I. C. C. 380.

³¹ Pittsburg Plate Glass Co. v. P., C., C. & St. L. Ry., 13 I. C. C. 87; In re Investigation of Advances in Rates on Grain, 21 I. C. C. 22; Commercial Club of Superior v. G. N. Ry., 24 I. C. C. 96.

really exists, it may affect transportation in ways which do not always show in the rate schedules. Competition may properly be considered in determining the correct classification of an article,³² but its effect is not to be extended to articles to which it does not apply by merely classing them with articles to which it does apply.³³ Railways may be forced to establish any-quantity rates on commodities because of competition with any-quantity water rates on those commodities.³⁴ Water competition may also justify a difference in the right of combining different commodities at the carload rate,³⁵ or of loading C. L. freight at one station and not at another.³⁶ Even the minimum weight of the carload may vary at different points because of competition. The fixing of the minimum weight at 20,000 pounds on shipments of bananas from New Orleans and Mobile to points west of the Mississippi River, while assessing a minimum weight of 18,000 pounds to Chicago and points east of the river, did not result in undue discrimination, as it appeared that such difference in minima was made to meet competition through Baltimore, and that cars of bananas from New Orleans and Mobile were usually loaded from 2,000 to 4,000 pounds in excess of the 20,000 pound minimum.³⁷ The privileges enjoyed by shippers will depend at many points on whether those points are competitive. The granting of a longer free time for unloading at New York than at Baltimore;³⁸ the granting of a milling-in-transit privilege to Minneapolis and St. Paul which is denied to Janesville;³⁹ the absorption of a terminal charge in favor of one locality or com-

³² Metropolitan Paving Brick Co. v. Ann Arbor Ry., 17 I. C. C. 197; Western Classification Case, 25 I. C. C. 442.

³³ In re Advances in Rates on Locomotives and Tenders, 21 I. C. C. 103.

³⁴ Schmidt & Peters, Inc., v. A., T. & S. F. Ry., 28 I. C. C. 376.

³⁵ City of Spokane v. No. Pac. Ry., 15 I. C. C. 376.

³⁶ Utica Traffic Bureau v. N. Y. C. & H. R. Ry., 18 I. C. C. 271.

³⁷ Topeka Banana Dealers' Ass'n v. St. L. & S. F. Ry., 11 I. C. C. 620.

³⁸ Brey v. Pennsylvania Ry., 16 I. C. C. 497.

³⁹ Blodgett Milling Co. v. C., M. & St. P. Ry., 23 I. C. C. 448.

modity to the prejudice of another;⁴⁰ the giving of free store-door pick-up and delivery to one section of a city while denying it to others;⁴¹ the giving of an icing privilege at one point which is refused at others;⁴² the granting of an elevator allowance at one point and not at another;⁴³ the maintenance of proportional rates on grain at Omaha while denying them at Sioux City;⁴⁴—all these have been upheld because of the existence of competition at the favored point. But on the other hand the fact that the market for a commodity is better at the long-distance point than at the intermediate point does not justify a lower rate to the former;⁴⁵ nor does water competition justify charging different export rates merely by reason of the fact that beyond the port of transshipment the traffic is to be carried to different destinations.⁴⁶ It should be noted that even though a carrier be entitled to reduce its rates to a low margin at competitive points, it does not thereby free itself from the obligation to grant reasonable rates to intermediate or non-competitive points. To determine what is a reasonable rate is difficult, but obviously a rate which has been forced upon the carrier by competition cannot be taken as the standard of measurement.

§ 795. Commodity and market competition.

The competition which may be considered in proper cases includes not only that between carriers with its usual incidents, but also that of a commodity produced

⁴⁰ *Cattle Raisers' Ass'n v. F. W. & D. C. Ry.*, 7 I. C. C. 513.

⁴¹ *Anacostia Citizens' Ass'n v. B. & O. Ry.*, 25 I. C. C. 411.

⁴² *Kenner Truck Farmers' Ass'n v. Ill. Cent. Ry.*, 32 I. C. C. 1.

⁴³ *Riley v. W. Ry.*, 25 I. C. C. 210; *Gund & Co. v. C., B. & Q. Ry.*, 25 I. C. C. 326. The payment of an elevator charge by a railroad company when compelled by competition

is lawful. *Interstate Commerce Commission v. Dittenbaugh*, 222 U. S. 42, 56 L. ed. 83, 32 Sup. Ct. 22.

⁴⁴ *Sioux City Terminal Elevator Co. v. C. N. & St. P. Ry.*, 23 I. C. C. 98.

⁴⁵ *Fewell v. R. & D. Ry.*, 7 I. C. C. Rep. 354.

⁴⁶ *New Orleans Board of Trade v. I. C. Ry.*, 23 I. C. C. 465.

in one section of the country with the same commodity produced in another section, and sometimes even the competition of one kind of traffic with another.⁴⁷ But competition in commodities alone is not a circumstance or condition that will entitle a selling point to have an already low rate made still lower in order to equal one at a more distant point, the latter having been made to meet the competition of carriers and of rates as well as of markets and of products.⁴⁸ The competition between carriers each serving a district in which a given commodity is produced to place that commodity on the market at great centers—what is known as market competition—has been viewed by the Commission in different ways at different times, and it is impossible to reconcile its decisions on the subject. In one line of cases it has held that market competition is to be encouraged,⁴⁹ even when it necessitates a rate unreasonably low and which does not yield a fair return for the service rendered.⁵⁰ The consumer should be given an opportunity to buy in all competing fields in so far as that can be fairly accomplished.⁵¹ Market competition is held to be so important a factor in rate making that it may justify discrimination.⁵² No case of market competition, however, may safely be made a precedent for any other.⁵³ On the other hand, the Commission has held that the ability of competing points of production to sell in a common market, in so far as it goes beyond the question of cost of transportation, is purely a commercial question and cannot enter into

⁴⁷ Metropolitan Paving Brick Co. v. Ann Arbor Ry., 17 I. C. C. 197.

⁴⁸ Bovaird Supply Co. v. A., T. & S. F. Ry., 13 I. C. C. 56.

⁴⁹ Andy's Ridge Coal Co. v. So. Ry., 18 I. C. C. 405; Massee & Felton Lumber Co. v. So. Ry., 23 I. C. C. 110.

⁵⁰ Edgar & Son v. L. & N. Ry., 26 I. C. C. 181.

⁵¹ Andy's Ridge Coal Co. v. So. Ry., 18 I. C. C. 405.

⁵² Southern Bitulithic Co. v. I. C. Ry., 17 I. C. C. 300. The differential between Omaha and Kansas City to Arkansas is fixed as a result of competition with Illinois and Iowa grain. Omaha Grain Exchange v. C., R. I. & P. Ry., 28 I. C. C. 680.

⁵³ Andy's Ridge Coal Co. v. So. Ry., 18 I. C. C. 405.

the determination of rates.⁵⁴ Again it has said that there is no such thing as market competition which is distinct from competition between lines of transportation serving the markets.⁵⁵ It has described market competition as "a euphemism for railroad policy," and has held that the desire of a number of shippers to reach a market is a force to which the carrier may not yield unless it can clearly establish that the adoption of such a policy will not unfairly discriminate against one community in favor of another, and will not produce those results which the Act was intended to prevent.⁵⁶ Market competition, moreover, should be carefully distinguished from competing markets. The fact that there is competition for the purchase of certain coal between Nebraska communities and communities in Wyoming and Utah affords no justification to the carrier for charging more than a reasonable rate for the transportation of such coal as the Nebraska people succeed in buying.⁵⁷

§ 796. How the Commission determines justifiable discrimination.

Since the Act in both the third and fourth sections recognizes that discrimination of certain kinds or to a certain extent may in certain circumstances and conditions be justifiable, it is the business of the Commission to ascertain whether such justification exists and whether the discrimination exceeds the justification. In passing upon an application for relief from the fourth section because of the existence of water competition, the Commission imposed the following tests: 1. Is it true that the long-distance rate is forced by water competition? 2. Is the long-distance rate which has been established in view of

⁵⁴ *Jennison Co. v. Gt. No. Ry.*, 18 I. C. C. 113.

⁵⁵ *City of Spokane v. No. Pac. Ry.*, 21 I. C. C. 400.

⁵⁶ *Railroad Commission of Nevada v. So. Pac. Ry.*, 21 I. C. C. 329.

⁵⁷ *Nebraska State Railway Commission v. Un. Pac. Ry.*, 11 I. C. C. 349.

water competition less than would otherwise be reasonable? 3. Are the rates at the intermediate points reasonable? 4. Do the rates unduly prefer one locality to another?⁵⁸ These tests, it would seem, apply equally well to land competition, and when competition is the defense they might also be employed in determining whether there was undue discrimination within the meaning of section 3. Having found that competitive conditions exist which make it imperative that some one should suffer, it is pertinent for the Commission to inquire how the least injury may be inflicted.⁵⁹ Everything depends upon the circumstances under which a rate is made and the transportation conducted,⁶⁰ and a change of conditions may lead to different conclusions.⁶¹ The Commission takes the whole situation into consideration, and even though it was competitive conditions among the shippers which were the chief inducement to the complaint, yet it will show due regard for transportation conditions and the rights of the carriers.⁶² It will also take into account the interests of all competing lines and not merely of that line which could handle the business at the lowest rate.⁶³ If competition exists at a certain point, the Commission is disposed to give shippers the benefit of it.⁶⁴ If the competition is between a railroad and a waterway, such as the Mississippi, the Commission will endeavor to measure the force of the competition at different distances from the river and thus determine what degree of discrimination is allowable at various points.⁶⁵

⁵⁸ *In re Transportation of Wool, Hides and Pelts*, 23 I. C. C. 151.

⁵⁹ *Bluefield Shippers' Ass'n v. N. & W. Ry.*, 22 I. C. C. 519.

⁶⁰ *Oregon & Washington Lumber Manufacturers' Ass'n v. So. Pac. Ry.*, 21 I. C. C. 389.

⁶¹ *Sinclair & Co. v. C., M. & St. P. Ry.*, 21 I. C. C. 490.

⁶² *Chicago Lumber & Coal Co. v. T. S. E. Ry.*, 16 I. C. C. 323.

⁶³ *Receivers & Shippers' Ass'n of Cincinnati v. C., N. O. & T. P. Ry.*, 18 I. C. C. 440.

⁶⁴ *Steinfeld & Co. v. I. C. Ry.*, 20 I. C. C. 12.

⁶⁵ *Railroad Commission of Tennessee v. Ann Arbor Ry.*, 17 I. C. C. 418.

§ 797. Competitive rates must be compensatory.

The fact that a carrier is compelled to make a low rate at a competitive point in order to obtain any part of the traffic at that point does not authorize it to lower its rate to any extent which may be necessary in order to attain this result. A carrier owes a duty to every point on its line to see that its traffic at one place, even though not very profitable, is at least not a burden on the traffic at other points. If railway carriers engage in a competitive struggle for business at a place where they meet, and underbid each other or other carriers to a point which is not in itself remunerative, can they turn back on the line, and taking advantage of the conditions existing at other localities, arising either from the fact that there is no opportunity for competition, or from the fact that by concert of the carriers there is none, charge such rates for the shorter haul as shall make good their lack of profits in competitive business, and even up the profits on their whole business to the point they set before themselves as reasonable? ⁶⁶ Against this Mr. Justice White clearly expressed the dissent of his court: "That, as indicated in the previous opinions of this court, there may be cases where the carrier cannot be allowed to avail of the competitive condition because of the public interests and the other provisions of the statute, is of course clear. What particular environment may in every case produce this result cannot be in advance indicated. But the suggestion of an obvious case is not inappropriate. Take a case where the carrier cannot meet the competitive rate to a given point without transporting the merchandise at less than the cost of transportation, and therefore without bringing about a deficiency, which would have to be met by increased charges upon other business. Clearly, in such a case, the engaging in such competitive traffic would both bring about an unjust discrimination and a disregard of the public interest, since a tendency towards

⁶⁶ Interstate Commerce Com. v. East Tennessee, V. & G. Ry., 85 Fed. 107.

unreasonable rates on other business would arise from the carriage of traffic at less than the cost of transportation to particular places.”⁶⁷ Thus it is evident that there are limits beyond which a carrier may not go in its attempt to meet competition.⁶⁸ It is well settled that a carrier may not lawfully engage in transportation at a rate less than the cost of service, since this would result in an improper and unlawful burden on other traffic.⁶⁹

§ 798. Non-competitive rates must be reasonable.

While the Act favors the competitive point in that it allows it to reap whatever advantage its competitive conditions may afford, it nowhere contemplates that the interests of the intermediate points are to be sacrificed. As has just been indicated, the carrier is obliged to make a rate to the competitive point which is at least high enough to meet the cost of service, and thus save non-competitive points from the burden of any loss on competitive traffic. Furthermore, no matter what rate is charged to competitive points, every non-competitive point is entitled to a rate which is reasonable. The mere fact of competition, regardless of its character or extent, does not relieve the carrier of the restraints of the third and fourth sections.⁷⁰ While competition may justify the carrier in charging to competitive points a rate that is less than reasonable, it does not deprive other points of their right to a rate that is not unreasonably high,⁷¹ and a carrier applying for relief under the fourth section must show that its in-

⁶⁷ *East Tennessee, V. & G. Ry. v. Interstate Commerce Com.*, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. 516. See also *Interstate Commerce Commission v. Alabama Midland Ry.*, 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. 45; *Chamber of Commerce of New York v. N. Y. C. & H. R. Ry.*, 24 I. C. C. 55.

⁶⁸ *Burnham, Hanna, Munger Co. v. C., R. I. & P. Ry.*, 14 I. C. C. 299.

⁶⁹ *City of Spokane v. No. Pac. Ry.*, 19 I. C. C. 162; *Commercial Club of Superior v. G. N. Ry.*, 24 I. C. C. 96.

⁷⁰ *Interstate Commerce Com. v. Alabama Midland Ry.*, 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. 45.

⁷¹ *Southern Timber & Land Co. v. So. Pac. Ry.*, 18 I. C. C. 232; *Grain Rates in C. F. A. Territory*, 28 I. C. C. 549.

intermediate rates do not violate this right.⁷² In determining what is reasonable, the Commission will examine the situation at the intermediate point. If it is a junction served by another carrier it is entitled to a lower rate.⁷³ Obviously the reasonableness of the non-competitive rate cannot be determined by comparison with the competitive rate,⁷⁴ but if it can be shown that the latter is reasonable, it should not be exceeded at a point with a shorter haul.⁷⁵ In the absence of any differentiating circumstance, the reasonableness of the intermediate rate may be determined by a comparison with other rates for the same distance.⁷⁶

§ 799. Potential competition.

Both the Commission and the courts recognize that rates may be affected by potential as well as actual competition. While the courts were somewhat reluctant to take this view, their hesitation may be largely explained by the facts of the cases before them. Chief Justice White said, "What the 4th section of the Act to Regulate Commerce has reference to is an actual dissimilarity of circumstances and conditions, not a conjectural one."⁷⁷ But this was only a dictum and was said with reference to a possible competition by a route so circuitous as to be altogether impracticable. Before any legal restraint was placed on the carriers in the making of rates, they were obliged to take into account not only existing competition but also that which could easily be developed. There is nothing in the Act which prevents the carrier from applying the same sound business principle. When it is once admitted that existing competition is a dissimilarity

⁷² Bluefield Shippers' Ass'n v. N. & W. Ry., 22 I. C. C. 519.

⁷³ Gamble-Robinson Commission Co. v. St. L. & S. F. Ry., 19 I. C. C. 114.

⁷⁴ Flint & Walling M'fg Co. v. G. R. & I. Ry., 14 I. C. C. 520; Rainey & Rogers v. St. L. & S. F. Ry.,

18 I. C. C. 88; Gillis & Son v. P. B. & W. Ry., 26 I. C. C. 61.

⁷⁵ Bluefield Shippers' Ass'n v. N. & W. Ry., 22 I. C. C. 519.

⁷⁶ Fourth Section Violations in the Southeast, 30 I. C. C. 153.

⁷⁷ Interstate Commerce Commission v. L. & N. Ry., 190 U. S. 273, 47 L. ed. 1047, 23 Sup. Ct. 687.

of circumstances which excuses a discrimination in rates, it logically follows that potential competition must be allowed to have the same influence. And this is the view now taken by the Commission and the courts.⁷⁸ But care must be taken to distinguish potential competition from merely possible or conjectural or imaginary competition. It must be a competition that is reasonably apprehended.⁷⁹ A river which is not navigable is in no sense a competitor, but when an appropriation has been made for dredging it, it at once becomes a potential competitor.⁸⁰ A river continues to be a potential competitor of a railroad even though the boats on it have ceased running for lack of cargoes.⁸¹ The ocean without a ship upon it is nevertheless a powerful factor in restraining rates of land carriers.⁸² Potential competition by the Tehuantepec route justifies low rates from the Mississippi to the Pacific coast.⁸³ The Erie canal, as an active competitor, has to a considerable extent disappeared, but it still produces a profound effect upon grain rates.⁸⁴ The Great Lakes not only compete with land carriers through the vessels now in service on them, but also through the vessels potentially in service on them.⁸⁵ It is not the actual amount of competition but the ever-present possibility of its increasing which is significant.⁸⁶ Such a potentiality

⁷⁸ *E. T., V. & G. Ry. v. Interstate Commerce Commission*, 99 Fed. 52, 39 C. C. A. 413; *Lead Commercial Club v. C. & N. W. Ry.*, 12 I. C. C. 460; *Planters' Gin & Compress Co. v. Y. & M. V. Ry.*, 16 I. C. C. 131; *Memphis Cotton Oil Co. v. I. C. Ry.*, 17 I. C. C. 313; *Kentucky Wagon M'fg Co. v. I. C. Ry.*, 18 I. C. C. 360; *Audley Hill & Co. v. So. Ry.*, 20 I. C. C. 225; *Bowling Green Business Men's Ass'n v. L. & N. Ry.*, 24 I. C. C. 228; *Memphis Freight Bureau v. B. & O. Ry.*, 28 I. C. C. 543; *Texarkana Freight Bureau v. St. L., I. M. & S. Ry.*, 28 I. C. C. 569.

⁷⁹ *Transcontinental Commodity Rates, West Bound*, 26 I. C. C. 456.

⁸⁰ *Texarkana Freight Bureau v. St. L., I. M. & S. Ry.*, 28 I. C. C. 569.

⁸¹ *Arkansas Fertilizer Co. v. St. L., I. M. & S. Ry.*, 25 I. C. C. 645.

⁸² *Railroad Commission of Nevada v. So. Pac. Ry.*, 21 I. C. C. 329.

⁸³ *Kentucky Wagon M'fg Co. v. I. C. Ry.*, 18 I. C. C. 360.

⁸⁴ *Board of Trade of Chicago v. A. C. Ry.*, 20 I. C. C. 504.

⁸⁵ *Commercial Club of Duluth v. B. & O. Ry.*, 27 I. C. C. 639.

⁸⁶ *City of Spokane v. No. Pac. Ry.*, 21 I. C. C. 400.

not only influences rates but insures better service and fairer treatment.⁸⁷ The extent to which a carrier shall lower its rate to meet anticipated competition is a matter primarily for its decision, and should it later raise the rate, the sole question for the Commission's determination is whether that increased rate is just and reasonable for the service performed.⁸⁸

§ 800. Suppression of competition by agreement.

In *East Tennessee, Virginia and Georgia Railway v. Interstate Commerce Commission*,⁸⁹ Judge Taft in the Circuit Court of Appeals dealt with an apparent competition which was not real because of a secret arrangement between the carriers. The lower rates for the longer haul from Nashville to the seaboard were justified by the competition at Nashville between two railroads, the Louisville & Nashville and the Nashville, Chattanooga and St. Louis. There was an apparent competition between these roads, and they named independent rates; but the latter road was controlled by the former through ownership of a majority of the stock. The Circuit Court of Appeals held that this was not a real competition, and could not be considered as a dissimilar circumstance which would justify a difference in rates. The Supreme Court reversed the decision on the ground that the facts on which it was based were at variance with those found by the Commission; and the court refrained from expressing its opinion upon the proposition of law.⁹⁰ It is difficult to see how any doubt can exist on the point. If the Circuit Court of Appeals was right in finding that the competition which appeared to exist at Nashville was in reality stifled by a control of all carriers by one of them, there was surely no such competition as would create a dissimilar condition forc-

⁸⁷ *New England Investigation*, 27 I. C. C. 560.

⁸⁸ *Scrap-iron Rates between Duluth and Chicago*, 28 I. C. C. 467.

⁸⁹ 99 Fed. 52, 39 C. C. A. 413.

⁹⁰ *East Tennessee, V. & G. Ry. v. Int. Com. Comm.*, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. 512.

ing upon one road a low competitive rate. In a later case in the Supreme Court, Mr. Justice White said: "Of course, if, by agreements or combinations among carriers, it were found that at a particular point rates were unduly influenced by a suppression of competition, that fact would be proper to consider in determining the question of undue discrimination and the reasonableness *per se* of the rates at such possible competitive points."⁹¹ This view was adopted by the Commission when a railroad attempted to justify a competitive rate at a point where it had obtained control of the competitive water carrier.⁹²

§ 801. Suppression of competition by consolidation.

Where competition at the intermediate point is stifled, not by an agreement among the competing roads, but by a consolidation of all the roads into one, it has been urged that for the purpose of determining the reasonableness of discrimination the point should continue to be regarded as a competitive point. This was urged in the Danville case.⁹³ The rates between southern and western points and Danville were very much higher than those between the same points and Lynchburg, the business rival of Danville. There was an active competition between railroads at Lynchburg. Such competition had existed at Danville, but all the other roads were absorbed by the Southern Railway. The courts held the discrimination justified. The case went off on the ground that before the consolidation of the last competing road with the Southern the rates were as high as at the time proceedings were begun. When carriers which are nominally competitive are controlled by the same persons, it is difficult to make out a competitive condition which will justify discrimination.⁹⁴ Common ownership puts it in the power

⁹¹ *Interstate Commerce Com. v. Louisville & N. R. R.*, 190 U. S. 273, 47 L. ed. 1047, 23 Sup. Ct. 687.

⁹² *Bowling Green Business Men's Ass'n v. L. & N. Ry.*, 24 I. C. C. 228.

⁹³ *Interstate Commerce Commission v. Southern Ry.*, 117 Fed. 741, 122 Fed. 800, 60 C. C. A. 540.

⁹⁴ *Bowling Green Business Men's Ass'n v. L. & N. Ry.*, 24 I. C. C. 228.

of the controlling interest to stifle all real competition, and the history of such relationship shows that the power is likely to be used.⁹⁵ Where two roads are under a substantially common ownership and control, they are considered as one system, notwithstanding the fact that they may be operated separately, and each is considered as having its rails extended to points directly served by the other.⁹⁶

§ 802. Carriers may refuse to make competitive rates.

Since the Act authorizes carriers to make lower rates to points where competitive conditions obtain, many shippers concluded that the Act gave them the right to demand lower rates at such points. But such a construction of the Act is unwarranted. While the law permits carriers to maintain low rates under stress of competition, it does not require them to do so.⁹⁷ Hence where two carriers serve the same destination from two different points of origin, neither can be held to discriminate against mills at that destination because it sees fit to make or refuse a rate lower than is inherently reasonable.⁹⁸ Whether they will reduce their rates to competitive points or not is a question of business policy which each carrier is free to determine for itself. Not infrequently it happens that a carrier would increase its rates in order to retire from traffic to competitive points rather than sacrifice much needed additional revenue on traffic to its intermediate stations.⁹⁹ Shippers, therefore, must trust to economic pressure to secure for them low rates at competitive points.¹ The Commission has no power to

⁹⁵ *Flour City S. S. Co. v. L. V. Ry.*, 24 I. C. C. 179.

⁹⁶ *Commercial Club of Superior v. G. N. Ry.*, 24 I. C. C. 96.

⁹⁷ *Crews v. R. & D. Ry.*, 2 Int. Com. Rep. 703, 1 I. C. C. Rep. 401; *Oregon & Washington Lumber Manufacturers' Ass'n v. Un. Pac. Ry.*, 14 I. C. C. 1.

⁹⁸ *Saginaw & Manistee Lumber*

Co. v. A., T. & S. F. Ry., 19 I. C. C. 119.

⁹⁹ *Kansas-Iowa Birch Rates*, 28 I. C. C. 285.

¹ *North Brothers v. C., M. & St. P. Ry.*, 15 I. C. C. 70; *Darling & Co. v. B. & O. Ry.*, 15 I. C. C. 79; *Bainbridge Board of Trade v. L. H. & St. L. Ry.*, 15 I. C. C. 586; *Lindsay Brothers v. B. & O. S. W.*

order a reduction in rates in order to meet competition.² If two carriers serve a common point at the same rate, and the carrier with the shorter line reduces its rate, the carrier with the longer line is not obliged to do the same.³ But if a carrier elects to make a competitive rate, it thereby subjects itself to certain restraints. It cannot compete at one point and decline to compete at another where all the conditions are the same.⁴ Nor ordinarily should it be allowed to compete one day and decline to do so the next. This would violate the public's right to equal and uniform treatment. Hence, if a carrier once establishes a competitive rate there may be circumstances under which the Commission will require its continuance.⁵ In deciding to what extent it will meet competition the carrier must avoid any undue discrimination between localities.⁶ While a railway may refuse to meet the competitive rates of a water carrier, it may not charge a high and unreasonable rate and justify it on the ground that there was water carriage available to shippers at a low and reasonable rate.⁷ It is permissible for a carrier to establish competitive rates on certain commodities between two points and refuse to do so on other commodities even though the same degree of competition is involved.⁸ In the case of connecting

Ry., 16 I. C. C. 6; *Frederick & Kempe Co. v. N. Y., N. H. & H. Ry.*, 18 I. C. C. 481; *Georgia-Carolina Brick Co. v. So. Ry.*, 20 I. C. C. 148; *Cohen & Co. v. Mallory Steamship Co.*, 23 I. C. C. 374; *Omaha Grain Exchange v. C., M. & St. P. Ry.*, 24 I. C. C. 122.

² *LaSalle Paper Co. v. M. C. Ry.*, 16 I. C. C. 149; *Chicago Lumber & Coal Co. v. T. S. Ry.*, 16 I. C. C. 323.

³ *Commercial Coal Co. v. B. & O. Ry.*, 15 I. C. C. 11.

⁴ *Darling & Co. v. B. & O. Ry.*, 15 I. C. C. 79; *City of Spokane v. No. Pac. Ry.*, 21 I. C. C. 400. Granting Los Angeles terminal rates be-

cause of water competition at San Pedro and refusing such rates at San Pedro constituted unlawful discrimination. *Harbor City Wholesale Co. of San Pedro v. So. Pac. Ry.*, 19 I. C. C. 323.

⁵ *Darling & Co. v. B. & O. Ry.*, 15 I. C. C. 79; *City of Spokane v. No. Pac. Ry.*, 21 I. C. C. 400.

⁶ *Slider v. So. Ry.*, 24 I. C. C. 312.

⁷ *So. Pac. Co. v. Interstate Commerce Commission*, 219 U. S. 433, 55 L. ed. 283, 31 Sup. Ct. 288.

⁸ *Traffic Ass'n of St. Louis Coffee Importers v. I. C. Ry.*, 28 I. C. C. 484.

roads it is not necessary that they should all adopt the same policy. One of them may extend a low rate for a special service without in any way involving its connections.⁹ But whenever a shipper seeks lower rates because of competitive conditions, he must address his appeal to the carrier. If it refuses to make any concessions to the conditions which prevail, the shipper has no ground of complaint. The Act excuses the carrier in making certain discriminations, but it does not clothe the shipper with any new rights whereby he may compel discrimination.

Topic F. What Circumstances Justify Preferential Rates

§ 803. Substantial difference of conditions which justify discrimination.

The circumstances or conditions prevailing at two points may be so different as to necessitate a difference in rates. The Act recognizes this as a good defense to the carrier which allows such dissimilarity to be reflected in its rates. While it is true that the carrier's motive in fixing a rate will not in itself prevent the rate from being unduly discriminatory, yet if the carrier can prove a substantial dissimilarity of condition, such as competition, that will go far toward relieving it from the charge that the rate was intended to work injustice.¹⁰ The duty of a carrier to refrain from giving preference or advantages to one shipper or locality over another exists only where substantially the same or similar conditions are prevalent.¹¹

⁹ Topeka Banana Dealers' Ass'n v. St. L. & S. F. Ry., 13 I. C. C. 620.

¹⁰ Interstate Commerce Commission v. C. G. W. Ry., 209 U. S. 108, 52 L. ed. 705, 28 Sup. Ct. 493.

¹¹ U. S. v. O. R. & Nav. Co., 159 Fed. 975; Railroad Commission v. L. & N. Ry., 11 I. C. C. 300; Pittsburgh Plate Glass Co. v. P., C., C. & St. L. Ry., 13 I. C. C. 87; Black Mountain Coal Land Co. v. Southern

Ry., 15 I. C. C. 286; Fort Dodge Commercial Club v. I. C. Ry., 16 I. C. C. 572; Sondheimer Co. v. I. C. Ry., 17 I. C. C. 60; In re Advances in Demurrage Charges, 25 I. C. C. 314; Janesville Clothing Co. v. C. & N. W. Ry., 26 I. C. C. 628; Merchants' Freight Bureau of Little Rock v. A., T. & S. F. Ry., 26 I. C. C. 543; Port Arthur Board of Trade v. A. & S. Ry., 27 I. C. C. 388; Vulcan Iron Works Co. v. A. F. & S. F. Ry.,

Although the third section of the Interstate Commerce Act does not carry the phrase embodied in section 2, "under substantially similar circumstances and conditions," it contains the words, "in any respect whatsoever"; and therefore the thought contained in section 2 must be present to the mind in considering under section 3 what preferences or advantages are undue or unreasonable.¹² Hence when unjust discrimination against one point and undue preference in favor of another are alleged, because of lower rates to the latter, and equality of rates is demanded as a cure for such unjust discrimination against the former, it must be shown that the circumstances and conditions at the two points are substantially similar, and that the lower rates at the one point were the result of the voluntary action of the carriers at that point.¹³ But the "circumstances and conditions" referred to in section 2 of the Act are those which arise within the field of haulage and not those which exist outside.¹⁴ Furthermore, unlike circumstances which will justify discrimination must be connected with the traffic over the line on which the discrimination is made. "If the respondent is acting, or claims to act, under the compulsion of circumstances and conditions of its own creation or connivance in the making of an exceptional rate, then these will not avail it."¹⁵ Therefore where goods were offered to a carrier at Mobile it could not charge more than the Mobile rate, on the ground that the carriage of the goods really originated at another place and had been brought from there by a cheap conveyance instead of by a carrier with whom the present carrier had a traffic arrangement;¹⁶ and the same thing is

27 I. C. C. 468; Mississippi River Case, 28 I. C. C. 47.

¹² Board of Trade of Carrollton v. C. of G. Ry., 28 I. C. C. 154.

¹³ Bainbridge Board of Trade v. L. H. & St. L. Ry., 15 I. C. C. 586.

¹⁴ Pennsylvania Ry. v. Interna-

tional Coal Mining Co., 173 Fed. 1.

¹⁵ Business Men's Ass'n v. C., S. P., M. & O. Ry., 2 Int. Com. Rep. 41, 2 I. C. C. Rep. 52.

¹⁶ Bigbee & W. R. Packet Co. v. M. & O. Ry., 60 Fed. 545.

true in the case of carriage of passengers.¹⁷ In determining whether the conditions at two points are sufficiently unlike to warrant different rates, the carrier is not obliged to give to every difference the same weight which the Commission must give when it is asked to determine whether an undue discrimination exists;¹⁸ but the difference in transportation conditions must be substantial in order to justify a difference in rates,¹⁹ and must be clearly shown.²⁰ The rates applicable to each kind of traffic must necessarily be made with reference to the circumstances governing the production, transportation and marketing of the various products.²¹ The dissimilarity of condition which is most widely found, or which at any rate is most frequently alleged by the carrier as justification for a difference in rates, is the existence of competition at the preferred point which does not obtain at the complaining point.²²

§ 804. Cost of service as a difference of condition.

Another primary consideration for the carrier is the cost of the service rendered. If conditions at a given point render service at that point more expensive than at another, it must pay the penalty in the form of higher rates. It cannot be relieved of its disadvantages by an equalization of rates.²³ Among such conditions are steep grades making difficult operation,²⁴ the necessity of crossing a river on a toll bridge,²⁵ and heavy terminal expenses, which

¹⁷ *Bennett v. Dutton*, 10 N. H. 481, B. & W. 105.

¹⁸ *Hitchman Coal & Coke Co. v. V. & O. Ry.*, 16 I. C. C. 512.

¹⁹ *In re Restricted Rates*, 20 I. C. C. 426.

²⁰ *Bovaird Supply Co. v. A., T. & S. F. Ry.*, 13 I. C. C. 56.

²¹ *East St. Louis Cotton Oil Co. v. St. L. & S. F. Ry.*, 20 I. C. C. 37.

²² Competition as a dissimilarity of circumstances and conditions is treated in secs. 792-802.

²³ *Bellsdyke Coal Co. v. North British Ry.*, 2 Ry. & Can. Tr. Cas. 105; *Nitshill Coal Co. v. Caledonian Ry.*, 2 Ry. & Can. Tr. Cas. 39.

²⁴ *Buckway v. U. & D. Ry.*, 8 I. C. C. 21; *Billings Chamber of Commerce v. C., B. & Q. Ry.*, 19 I. C. C. 71; *Board of Trade of Winston-Salem v. N. & W. Ry.*, 26 I. C. C. 146.

²⁵ *Freight Bureau v. Cincinnati, N. O. & T. P. Ry.*, 7 I. C. C. 180; *Commercial Club v. C. & N. W. Ry.*, 7 I. C. C. 386.

are inevitably larger in a great center like Kansas City than in a smaller place where terminal work can be done more expeditiously and economically.²⁶ The location of a point on a branch line, involving as it usually does two or three terminal charges, presents a dissimilarity of condition as compared with points on the main line.²⁷ The volume of traffic and the possibility of back freights are also conditions which may justify a difference in rates, especially when light traffic is joined with difficult operation.²⁸ A difference in population and tonnage may constitute a dissimilarity which will make it lawful for a carrier to collect and deliver at its own expense in a city of 70,000, while not doing so in a city of 6,000.²⁹ Ports, even more than inland centers, differ from one another in the circumstances and conditions surrounding transportation, and the promptness with which a shipper releases equipment at one yard, where the facilities are ample, cannot reasonably be taken as conclusive in determining what would constitute promptness at another port.³⁰ Other circumstances than cost to the carrier may be considered. The fact that dealers at a particular point must pay for a team haul of from 20 to 40 miles justifies a difference in rates.³¹ Whether the Great Lakes are open or closed to navigation may

²⁶ *Rice v. Western N. G. & P. Ry.*, 2 I. C. C. 298, 2 I. C. C. Rep. 389; *Kansas City Transportation Bureau v. A., T. & S. F. Ry.*, 15 I. C. C. 491.

²⁷ *Lehman v. Texas & P. Ry.*, 3 I. C. C. 706, 5 I. C. C. 44; *Kansas City Transportation Bureau v. A., T. & S. F. Ry.*, 15 I. C. C. 491; *Board of Trade of Winston-Salem v. N. & W. Ry.*, 16 I. C. C. 12. But see *Santa Rosa Traffic Ass'n v. So. Pac. Ry.*, 24 I. C. C. 46.

²⁸ *New Orleans Cotton Exchange v. I. C. Ry.*, 2 Int. Com. Rep. 777, 3 I. C. C. Rep. 534; *Railroad Commission v. L. & N. Ry.*, 11 I. C. C. 300; *Chicago Lumber & Coal Co. v. T. S.*

W. Ry., 16 I. C. C. 326; *Billings Chamber of Commerce v. C., B. & Q. Ry.*, 19 I. C. C. 71; *Board of Trade of Winston-Salem v. N. & W. Ry.*, 26 I. C. C. 146; *Cherokee Lumber Co. v. A. C. L. Ry.*, 27 I. C. C. 438.

²⁹ *D., G. H. & M. Ry. v. Int. Com. Comm.*, 74 Fed. 803. See also on population as a difference of condition, *Anacostia Citizens' Ass'n v. B. & O. Ry.*, 25 I. C. C. 411; *Philadelphia Veneer & Lumber Co. v. C. Ry. of N. J.*, 25 I. C. C. 653.

³⁰ *Lynah & Read v. B. & O. Ry.*, 18 I. C. C. 38.

³¹ *Laner & Son v. So. Pac. Ry.*, 18 I. C. C. 109.

influence the rates on copper and copper wire.²² When a station is situated more than a mile from the business center of the city free cartage is justified, though it is not given in a neighboring city where the station is near the business center.²³ It has even been held that long established custom may be a "circumstance" justifying a difference in rates.²⁴ But even where dissimilarities of circumstance justify a preference, the carrier is not relieved altogether from the restraint of section 3 of the Act, and the amount of discrimination must not be greater than the dissimilarity of circumstances demands,²⁵ or than is warranted by the greater service which the carrier performs.²⁶

§ 805. Reconsignment arrangements and other transit privileges.

A very important feature in modern railroading is the permission given to the owners of goods in transit to have the advantages of the through rate upon paying a very small additional premium, although the transit is interrupted in order to do something to the commodities in question at some intermediate point, to prepare them for market, or even entirely to change their form by manufacture of some sort. A carrier may grant to a shipper the right to stop in transit to mill or clean or bag his grain, compress his cotton, or even to search for a local market, and then pursue the journey again, and charge a through rate for the whole transit; and this practice does not

²² *Michigan Copper & Brass Co. v. D. S. S. & A. Ry.*, 25 I. C. C. 357; *American Insulated Wire and Cable Co. v. C. & N. W. Ry.*, 26 I. C. C. 415.

²³ *Interstate Commerce Commission v. D., G. H. & N. Ry.*, 167 U. S. 633, 42 L. ed. 306, 17 Sup. Ct. 986.

²⁴ *D., G. H. & N. Ry. v. Int. Com. Comm.*, 74 Fed. 803.

²⁵ *Brady v. Penn. Ry.*, 2 Int. Com. Rep. 78, 2 I. C. C. 131; *Planters' Gin & Compress Co. v. G. & M. V. Ry.*, 16 I. C. C. 131; *Sondheimer v. I. C. Ry.*, 17 I. C. C. 60; *Galveston Commercial Ass'n v. A., T. & S. F. Ry.*, 25 I. C. C. 216. But see *Hitchman Coal & Coke Co. v. V. & O. Ry.*, 16 I. C. C. 512.

²⁶ *In re Wharfage Charges at Galveston*, 26 I. C. C. 695.

unduly prejudice other points.³⁷ Under such circumstances a through rate may be established, not by uniting on a single rate for one entire haul over two roads, but by charging the separate rate on the goods to the junction point, and then, upon the goods being there reconsigned and reshipped over a second road, paying a rebate on the charges of the first or of the second road.³⁸ This is sometimes allowed when the goods are taken by the consignee at the junction point and there held for a considerable time, for the purpose of awaiting a favorable turn of the market. These privileges are only applicable to shipments intended from the outset to be through shipments,³⁹ and in order that this privilege may be legal, the agreement for through carriage must be made at the time of the original shipment.⁴⁰ And the privilege must be extended by the carrier to all shippers on its line under similar circumstances and conditions, or else that place to which the privilege is not given will be unduly prejudiced.⁴¹ Permitting corn to be unloaded into elevators at Cairo, Ill., to be treated and shipped at balance of through rate, carrier paying to the elevator company an allowance of $\frac{3}{4}$ cent per 100 pounds, but refusing to allow such

³⁷ *Cowan v. Bond*, 39 Fed. 55, 2 Int. Com. Rep. 542; *Listman Mill Co. v. Chicago, M. & S. P. Ry.*, 8 I. C. C. Rep. 47; *Re Alleged Unlawful Rates*, 8 I. C. C. Rep. 121; *Re Rates and Practices of Mobile & O. Ry.*, 9 I. C. C. Rep. 373; *St. Louis H. & G. Co. v. Illinois Cent. R. R.*, 11 I. C. C. Rep. 486.

³⁸ Railroads which have formerly allowed reconsignment without additional charge may make an extra charge for cars standing on a "hold track" awaiting reconsignment directions. *State v. Atchison, T. & S. F. Ry. Co.*, 176 Mo. 687, 75 S. W. 776. See also *State v. Atlantic C. L. Ry. (Fla.)*, 52 So. 4.

³⁹ Although a true rebilling rate is

permissible where the same goods are reconsigned at some point in transit, the granting of a special rate for the transportation of other goods from a certain point to those who show "expense bills" for an equal amount received over an associated line constitutes illegal discrimination. *Alabama & V. Ry. Co. v. Railroad Commission*, 86 Miss. 667, 38 So. 356, affirmed in 203 U. S. 496, 51 L. ed. 289, 27 Sup. Ct. 163.

⁴⁰ *Re Alleged Unlawful Rates*, 7 I. C. C. Rep. 240.

⁴¹ *Commercial Club v. C., R. I. & P. Ry.*, 6 I. C. C. 647; *Koch v. Pennsylvania Ry.*, 10 I. C. C. Rep. 675.

privilege or make such allowance at Decatur, Ill., was held unduly preferential;⁴² and the granting of transit privileges on lumber at Memphis and denying it at Cairo was held to constitute an undue discrimination.⁴³ All reconsignment arrangements must be carefully scrutinized, for they readily lend themselves to abuse, and result in unlawful discrimination. An ingenious attempt to conceal such a preference under the guise of a reconsignment agreement was made by the Santa Fe Railway, which allowed a rate of 10 cents on barbed wire, wire nails, wire staples and wire fencing, in carloads, from El Paso, Tex., to Las Cruces, N. M., when brought into El Paso over its lines, but charged a rate of 30 cents when brought into El Paso over the lines of other carriers. To take advantage of the 10 cent rate, the shipper might keep the goods at El Paso as long as he desired, and the rate would be accorded to him upon shipment of the same to Las Cruces, provided only the goods were originally shipped into El Paso over defendant's lines. The Commission held that such a rate was not in any sense a proportional rate, could not be sanctioned as a transit, reconsignment, or diversion privilege, and was merely an unlawful device to compel shippers to send their goods into El Paso over the defendant's road.⁴⁴ A transit privilege may be withdrawn. Even though complainant alleged that its business had been built up on the strength of a transit privilege which had been taken away, the Commission refused to order its restoration.⁴⁵

§ 806. Back freight may be lower than outward freight.

There is no reason for requiring the same charge for carriage between the same points in opposite directions. Various factors which properly enter into the rate may be different in the two cases. One reason often given for

⁴² *Suffern Grain Co. v. I. C. Ry.*,
22 I. C. C. 178.

⁴³ *Sondheimer Co. v. I. C. Ry.*, 20
I. C. C. 606.

⁴⁴ *Bascom Co. v. A., T. & S. F. Ry.*,
17 I. C. C. 354.

⁴⁵ *Schmidt & Sons v. M. C. Ry.*,
19 I. C. C. 536.

justifying a higher rate in one direction is the fact that the volume of traffic may be less. It is characteristic of the inexact character of the law of rate making that this fact might also justify a lower rate, if the railroad chose to make it. At all events where in the direction of lighter traffic a railroad is carrying many empty cars, it will be justified in lowering the rate in order to fill the cars.⁴⁶ So the Commission has sustained the railways in charging a lower rate upon soft-wood lumber from Pacific coast producing points to eastern destinations than it charges upon hard-wood lumber from such eastern destinations to Pacific coast points.⁴⁷ When the preponderance of freight is so largely in one direction that the supply of empty cars exceeds the demand for return loads at full rates, it is held to be not unlawful to encourage business by affording transportation on less profitable terms. Of course this making of low "back freights" is subject to the limitation that the rate must not be so low as not to recoup the railroad for the additional expenses in hauling back loaded cars, which must receive due protection during transit.⁴⁸

§ 807. What differentials may be allowed.

In principle differentials do not differ from any other form of discrimination, but certain differentials have been practised for so long that a kind of legitimacy has come to be implied in that term which is not associated with the balder word discrimination. This perhaps is largely due to the fact that the term differential is never applied to discriminations between persons—a form of preference

⁴⁶ Special circumstances, such as the flow of traffic, may show that a higher freight rate in one direction than in the opposite is not an overcharge. *Scull v. Atlantic C. L. R. R. Co.*, 144 N. C. 180, 56 S. E. 876.

⁴⁷ *Burgess v. Transcontinental Freight Bureau*, 11 I. C. C. 668.

⁴⁸ But in testing the reasonableness of a freight charge for carriage

in one direction the fact that the freight rate is lower in the opposite direction tends to show that the higher rate is unreasonable where the grades on the road and the expense of moving trains is substantially the same in both directions. *Southern Ry. Co. v. Railroad Commission*, 42 Ind. App. 88, 83 N. E. 721.

which has been regarded as peculiarly offensive—but only to discriminations between commodities or between places, for which it is often possible to find some justification in public policy. The Commission itself has said that it may “be lawful and be supported by just public considerations, for carriers to give equal access to markets to localities of dissimilar distances; and it may involve no material difference in expense to the carrier. No producer or shipper has an exclusive right to supply a market, and the interests of consumers and of the general public may justify carriers in enlarging the field from which the demand for a commodity may be supplied on terms of equality for transportation. That is only a recognition of the principle that the general interests are paramount to individual or local interests.”⁴⁹ In dealing with complaints as to differentials between places, the Commission is confronted at the outset by the fact that many important commercial centers owe their very existence to differentials. In the argument before the Commission in the case of the Chamber of Commerce of New York v. N. Y. C. & H. R. Ry.,⁵⁰ counsel for Boston stated that Boston could not live unless it was given a differential under New York. The whole of industrial New England is equally dependent upon this form of discrimination. This to be sure is not a legal argument, but the Commission is always reluctant to disturb any rate adjustment of long standing, and when such disturbance would obviously be followed by disastrous consequences to an important community this reluctance is increased. In such cases therefore the Com-

⁴⁹ Quoted from Schoonmaker, Com., in *Imperial Coal Co. v. Pittsburgh & L. E. Ry.*, 2 Int. Com. Rep. 436, 2 I. C. C. Rep. 618. In *State ex rel. v. Minneapolis & St. L. R. R.*, 80 Minn. 191, 83 N. W. 60, 89 Am. St. Rep. 514, it was shown that the tariff rate on coal from D. to N. was \$2.50 and from D. to twenty-one stations

along the same lines, the most southerly being B., 112 miles beyond N., the rate was the same. The court inclined to support this schedule upon the commercial necessities of the situation, citing *Steenerson v. Gt. Northern Ry.*, 69 Minn. 353, 72 N. W. 713.

⁵⁰ 24 I. C. C. 55.

mission will ask whether the differential is undue, and if it is not, no change will be ordered.⁵¹ In this negative way the Commission gives its sanction to rate systems which it could not compel the carrier to make. Hence points which have long enjoyed differentials and which are content with differentials which are not undue or unreasonable are not likely to be disturbed by the Commission. At the same time the Commission holds that it is not the function of either the railroads or the Commission so to adjust rates that business will or will not be done at a particular place,⁵² or to apportion traffic between rival ports or cities.⁵³

§ 808. Systems of rate making based on differentials.

There are several systems of rate making, long in use and covering much of the country, which are at bottom only a kind of glorified differential. Such is the basing-point system which prevails at the South. Under this system certain places of more or less importance are selected as basing points, and through rates are then constructed by granting a comparatively low rate to the basing point, to which is then added the local rate to the point of destination.⁵⁴ The basing-line system involves the same principle, except that a line is used instead of a point. Both systems, it is alleged, are the outgrowth of competition, and are established in order that all roads concerned may share in the business and all shippers be given opportunity to compete in common markets.⁵⁵ It is obvious that both necessarily involve discrimination. Both the Commission and the courts, however, have upheld the system,⁵⁶ but the

⁵¹ *Andy's Ridge Coal Co. v. So. Ry.*, 18 I. C. C. 405.

⁵² *Duncan & Co. v. N. C. & St. L. Ry.*, 16 I. C. C. 590; *Suffern Grain Co. v. I. C. Ry.*, 22 I. C. C. 178.

⁵³ *Chamber of Commerce of New York v. N. Y. C. & H. R. Ry.*, 24 I. C. C. 55.

⁵⁴ A good description of the basing-

point system is given in *Board of Trade of Carrollton, Ga., v. C. of G. Ry.*, 28 I. C. C. 154.

⁵⁵ *Avery Manufacturing Co. v. A., T. & S. F. Ry.*, 16 I. C. C. 20.

⁵⁶ *Interstate Commerce Commission v. A. M. Ry.*, 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. 45; *Interstate Commerce Commission v. W. & A.*

Commission has held that there may be undue discrimination in the local rate⁵⁷ and in the selection of the basing points. The latter particularly has been a fruitful source of litigation, and the Commission has said that "the carrier is not at liberty in the selection of their basing points to determine that this town shall have the benefits of the low rate and that town shall not, when the means of competition and the conditions surrounding that competition do not materially differ."⁵⁸ Still a third system of rate making which involves differentials is that of blanket or group rates. In all group systems there is an inequality of rates, when distance alone is considered, as between points on one side of a group and those on the other side.⁵⁹ The rate to the nearer edge of the group as compared with the more distant edge is of necessity discriminatory. This discrimination grows relatively greater in proportion as the distance from the group decreases, and there must come a point when the place of origin is so near the group that the discrimination will become undue.⁶⁰ Nevertheless the Commission looks upon this method of rate making with favor, and finds it advantageous alike to the producers, the public, and the carriers.⁶¹

Ry., 181 U. S. 29, 45 L. ed. 729, 21 Sup. Ct. 512; *Interstate Commerce Commission v. L. & N. Ry.*, 190 U. S. 273, 47 L. ed. 1047, 23 Sup. Ct. 687.

⁵⁷ The local differentials may vary in accordance with local conditions. "In the making of joint through rates on long-distance traffic, to local or non-competitive points, the differentials above the rates to the basing points should bear some reasonable relation to the total distances involved; and where the long-haul traffic to local stations is meager these differentials may perhaps be higher than otherwise they would be." *Board of Trade of Carrollton, Ga., v. C. of G. Ry.*, 28 I. C. C. 154.

⁵⁸ *Mayor & Council of Tifton v. L. & N. Ry.*, 9 I. C. C. 160.

⁵⁹ *Saginaw Board of Trade v. G. T. Ry.*, 17 I. C. C. 128. All points in Texas common point territory, 500 miles in extent from north to south and 450 miles from east to west, take the same commodity rates from any point in the United States on or east of the Missouri and Mississippi rivers. *Texas Common Point Case*, 26 I. C. C. 528.

⁶⁰ *Kaufmann Commercial Club v. T. & N. D. Ry.*, 31 I. C. C. 162.

⁶¹ *Chicago Lumber & Coal Co. v. T. S. Ry.*, 16 I. C. C. 323; *American Coal Co. v. B. & O. Ry.*, 17 I. C. C. 149; *Waukesha Lime & Stone Co. v. C., M. & St. P. Ry.*, 26 I. C. C. 515;

In the making of blanket rates, commercial rather than transportation conditions govern, and this leads to a subordination of distance as a factor in the rate.⁶² If the adjustment of the group of rates as a whole is just and reasonable, inequalities in individual rates may be overlooked.⁶³ When blanket rates are compared with rates outside the group, neither extreme of the group should be taken, but rather a fair average.⁶⁴ The system by which rates are made is however of little interest to the Commission except as a means of enabling it to ascertain whether the rates are reasonable and non-discriminatory.⁶⁵ Rates upon whatever theory constructed must conform to those requirements.

§ 809. No obligation to make preferential rates.

How weak the argument is in favor of preferential rates of any kind is disclosed by one feature not perhaps as yet sufficiently emphasized. The utmost that these cases permitting preferential treatment have decided is that the company which adopts one of these policies to get business may perhaps be justified for making disproportionate rates. But it should be noted that no company receives any condemnation which ignores these policies altogether in fixing its rates. Even the most enthusiastic economists would not go so far as to argue that the railroads must make it their policy to equalize natural advantages, to the end that all regions shall have equal access to central markets.⁶⁶ Certainly legislation designed to enforce relative equality between rates is not outrageous; and

Where these towns are strong competitors it is important to have a common rate, if conditions justify it. *Railroad Commissioners of Florida v. S. A. L. Ry.*, 16 I. C. C. 1.

⁶² *Avery Manufacturing Co. v. A., T. & S. F. Ry.*, 16 I. C. C. 20.

⁶³ *Monroe Progressive League v. St. L. & I. M. & S. Ry.*, 15 I. C. C. 534.

⁶⁴ *Oregon Washington Lumber Manufacturers' Ass'n v. So. Pac. Ry.*, 21 I. C. C. 389.

⁶⁵ *State of Kansas v. A., T. & S. F. Ry.*, 27 I. C. C. 672.

⁶⁶ A State may insist upon an equality of rates under equivalent conditions. *Seaboard Air Line Co. v. Florida*, 203 U. S. 261, 51 L. ed. 175, 27 Sup. Ct. 109.

surely no rate making body would compel the establishing of preferential rates.⁶⁷ The Commission in fact has said that a carrier is under no obligation to counteract the results of natural conditions by rate reductions,⁶⁸ nor may any place claim a preference as a matter of right.⁶⁹ Certain economic necessities of the carrier are recognized as justifying it in making certain discriminations. Further than that the law does not go.

⁶⁷ A State may enforce equality of local rates even if loss results. *Alabama & V. Ry. Co. v. Mississippi R. R. Comm.*, 203 U. S. 496, 51 L. ed. 289, 27 Sup. Ct. 163.

⁶⁸ *National Refining Co. v. C., C., & St. L. Ry.*, 20 I. C. C. 649.

⁶⁹ *Billings Chamber of Commerce v. C., B. & Q. Ry.*, 19 I. C. C. 71.

PART II—PREVENTION OF DISCRIMINATION

CHAPTER XVII

SCHEDULES OF RATES

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§ 810. Provisions of the Act.

The original section for the filing of schedules, added to the machinery of regulation in 1889, was recast in 1906, and again amended in 1910. Every common carrier subject to the provisions of section 6 must file with the Commission, and print and keep open to public inspection, schedules showing all the rates, fares, and charges for transportation between different points on its own route, and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for trans-

portation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act. No change in rate shall be made without thirty days' notice to the Commission and the public; however, the Commission may permit the period to be shortened, or modify any of the provisions for publishing, posting and filing. The Commission may reject and refuse to file any schedule not conforming to the requirements of the Act.

§ 811. Scope of its policy.

One of the chief points of the policy requiring scheduling is to make it clear that any departure from the published rate is *ipso facto* discriminatory. It is to be noted that the Act definitely provides that no carrier shall charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device, any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs. And, to prevent, so far as may be, the covering of rebates by allowances to shippers incidentally, the Act as amended requires that the schedules filed shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. It is proper to add, however, that the require-

ment of publication found in the law is based upon many other considerations besides that of affording protection to shippers.

Topic A. Necessity of Filing Schedules

§ 812. What rates must be published.

The Commission will insist under all circumstances that all rates must be published, both for passengers and freight, together with all terms and conditions relating thereto.⁷⁰ If, for instance, first class and second class rates are given for passengers, both must be published.⁷¹ And where passenger excursion rates applicable only for the time being are offered, they must be published.⁷² In order to make any distinction in rating of freight for export, the rates must be given as well on freight which is, as on that which is not, for export.⁷³ It is fundamental that all services and privileges must be scheduled to be available, and adherence to these principles has been demanded by repeated decisions of the Commission.⁷⁴ Thus the privilege of reconsignment is service requiring publication to make its granting legal.⁷⁵ There should be a tariff provision to justify a charge for re-icing when fruit is moving under refrigeration.⁷⁶ Terminal charges must be scheduled, in order to be made the basis for constructing rates based upon billing for services performed.⁷⁷ And there should be no transit rights granted except such as are scheduled.⁷⁸ And in general it may be said that under the sweeping provisions of the Act as amended no charge

⁷⁰ Re Tickets, 23 I. C. C. 95.

⁷¹ Folmer & Co. v. G. W. Ry., 15 I. C. C. 33.

⁷² Pittsburgh, C. & S. L. Ry. v. Baltimore & O. R. R., 2 Int. Com. Rep. 729, 3 I. C. C. 465.

⁷³ New Orleans Cotton Exch. v. Louisville, N. O. & T. Ry., 3 Int. Com. Rep. 523.

⁷⁴ Folmer & Co. v. Great W., 15 I. C. C. 33.

⁷⁵ Bannon v. Southern Express Co., 13 I. C. C. 516.

⁷⁶ Atchison, T. & S. F. Ry., 18 I. C. C. 310.

⁷⁷ Neosho Milling Co. v. Kansas City So. Ry., Unrep. op. 433.

⁷⁸ New England C. & C. Co. v. N. & W. Ry., 22 I. C. C. 398.

can be made of the shipper by the carrier for anything connected with the transportation of his goods, so far as they are in course of carriage subject to the jurisdiction of the Commission, unless the rates therefor are to be found plainly enough set down in the schedules on file.

§ 813. Effect of scheduling rates.

A rate may be unlawful in view of section 1, and at the same time be the legally established rate under section 6. The sole test of the legality of a charge is the publication of the rate in the manner and form prescribed by the statute.⁷⁹ Thus, although a scheduled rate may be proved unreasonable by proper proceedings before the Commission to have the same reduced, once it is put in effect, not having been suspended by action of the Commission, it remains the legal rate which all must pay so long as it remains unaltered. And conversely no charge can be rightfully collected where there is no tariff provision therefor, as the only basis for making a charge which has the sanction of the law is the schedule itself, open to all alike.⁸⁰ The jurisdiction of the Commission and the purposes of the law cannot be defeated by the omission or failure of carriers to include in their schedules, and to keep posted and open to public inspection the rates, fares and charges for the entire service, both transportation proper and refrigeration, which under the law they are bound to provide.⁸¹ Terminal charges being part of transportation and demurrage charges being included in the term "terminal charges," the failure by a carrier to observe demurrage tariffs filed and published by it and the soliciting and receiving of concessions with respect to demurrage charges are misdemeanors for which a prosecution will lie under the Act.⁸²

⁷⁹ *Crescent Coal & Mining Co. v. C. & E. I. R. R.*, 24 I. C. C. 149.

⁸⁰ *Beekman Lumber Co. v. L. Ry. & N. Co.*, 19 I. C. C. R. 343.

⁸¹ *Waxelbaum v. A. C. L. R. R.*, 12 I. C. C. 178.

⁸² *Lehigh V. R. R. v. United States*, 188 Fed. 179.

§ 814. Terminal and transit charges.

The rates which carriers are required by the Act to publish, file, and adhere to without deviation, cover not merely the carriage, but services rendered in receiving and delivering property as well.⁸³ The schedule should state, among other terminal charges, the rules and regulations, if any, of the carrier in relation to storage.⁸⁴ If free storage facilities are allowed, the schedule should so state.⁸⁵ So when charges for refrigeration are applied in the transportation of perishable freight, such charges should be published and followed as all other charges for transportation are published and observed.⁸⁶ Incidental service performed by carriers at transshipment ports, such as dumping and trimming or leveling, should be covered by tariff provisions and filed with the Commission.⁸⁷ And any charges by carriers for readjusting loads of piling or poles, made necessary by shifting, improper loading, or heavy grades, must be provided for by proper tariff rules.⁸⁸ The terminal service given at local stations must be published, and it must be plainly indicated which are free-delivery stations.⁸⁹ Demurrage is not required to be paid unless the tariff so provides.⁹⁰ According to these fundamental principles, penalties for delay cannot be imposed without tariff authority.⁹¹ And, generally speaking, when rates are filed and published, carriers must abide thereby, and no allowances of any kind not specified in tariffs can lawfully be paid.⁹²

⁸³ *Phelps v. Texas & P. Ry.*, 4 Int. Com. Rep. 363, 6 I. C. C. Rep. 36. & Refrigeration, 11 I. C. C. Rep. 129.

⁸⁴ *Pennsylvania Millers' State Ass'n v. Philadelphia & R. R. R.*, 8 I. C. C. Rep. 531; *Blackman v. Southern Ry.*, 10 I. C. C. Rep. 352. ⁸⁷ *New England C. & C. Co. v. N. & W. Ry. Co.*, 22 I. C. C. R. 398.

⁸⁵ *American Warehousemen's Ass'n v. Illinois Central R. R.*, 7 Int. Com. Rep. 556. ⁸⁸ *California Pole & Piling Co. v. S. P. Co.*, 22 I. C. C. 507.

⁸⁶ *In re Express Rates*, 24 I. C. C. 380. ⁹⁰ *Crescent Coal & Mining Co. v. B. & O. R. R.*, 20 I. C. C. 559.

⁸⁹ *Re Transportation of Fruit*, 10 I. C. C. Rep. 360; *Blackman v. Southern Ry.*, 10 I. C. C. Rep. 352; ⁹¹ *Crutchfield & Woolfolk v. S. P.*, 24 I. C. C. 651.

In re Charges for Transportation . ⁹² *La Salle & B. County R. Co. v.*

§ 815. Rules and regulations.

Rules or regulations in any wise changing, affecting, or determining any part of the aggregate of a carrier's rates, fares, or charges must be shown separately upon the posted schedules. Any such rules or regulations promulgated in circulars issued independently of such schedules are not lawfully in force.⁹³ The rates charged for the diversion of cars must be published.⁹⁴ If stop-over privileges are granted for any purpose, all the facts and circumstances connected therewith should be clearly stated in the published tariff, so that the public generally may enjoy their benefits.⁹⁵ So where cotton is allowed a stop-off privilege for the purpose of grading and compressing, this forms part of the service covered by the rate, and should be specified in the published tariffs.⁹⁶ Where there is tariff authority, it is no violation of Act to require validation of limited excursion tickets, and to charge validation fee therefor.⁹⁷ The Commission requires that the carrier should publish, or post for convenient inspection, at frequent and regular intervals, the ratings of the various mines and the car tonnage.⁹⁸ Whatever rules prescribing maximum and minimum carload weights there may be found necessary to impose, must be posted.⁹⁹ In one proceeding it appeared that defendant instructed its agents to disregard the regular published tariff rates, and to charge a lower combination rate when less than tariff rates were in force at other stations on its line. It was held that this practice was unlawful, as any rule would be which was not in compliance with the requirements of the

Chicago & N. W. R. Co., 11 I. C. C. 610.

⁹³ *Suffern v. Indiana, D. & W. Ry.*, 7 I. C. C. Rep. 255.

⁹⁴ *American Warehousemen's Ass'n v. Illinois Central R. R.*, 7 I. C. C. Rep. 556.

⁹⁵ *In re Rates and Practices, Mobile & O. Ry.*, 9 I. C. C. Rep. 373.

⁹⁶ *Re Alleged Unlawful Rates*, 8 I. C. C. Rep. 121.

⁹⁷ *Riter v. O. S. L. R. R.*, 19 I. C. C. R. 443.

⁹⁸ *Royal Coal & Coke Co. v. Southern Ry.*, 13 I. C. C. 440.

⁹⁹ *Suffern v. Indiana, D. & W. Ry.*, 7 I. C. C. Rep. 255.

Act.¹ In a later case it was said that no objection exists to providing in a tariff that, when a consignee has neglected to unload shipment within the free time provided in the carrier's demurrage rule, the carrier may unload it. And it was said that when this is done a charge will be assessed therefor.²

§ 816. What constitutes sufficient publication.

The provisions of the law are not complied with by posting a notice stating that tariffs may be inspected upon application to the carrier's agent.³ Whatever the practical difficulties in arranging matters so that a shipper may at all times have access to schedules, the law must be observed.⁴ The Act requires publication and maintenance of definite transportation charges;⁵ and it lays upon carriers the duty to publish and file rates applicable to interstate traffic in which they participate.⁶ Publication consists in promulgating and distributing the tariff in printed form preparatory to putting it into effect;⁷ and it is a step in establishing rates which cannot be dispensed with.⁸ And this general publication is constructive notice, in that all concerned are affected thereby in regard to all matters pertaining to the transportation.⁹ The fact that a shipper is not given personal notice of the promulgation of a carrier's demurrage regulations neither vitiates the latter's right nor lessens its duty to impose demurrage charges incurred under the rules contained in its lawful tariff.¹⁰ A carrier cannot excuse the collection of an unpublished charge for transferring goods by proof that it had a rule

¹ *Spillers v. Louisville & N. R. R.*, 8 Int. Com. Rep. 364.

² *Schulz-Hansen Co. v. S. P. Co.*, 18 I. C. C. 234.

³ *Paxton Tie Co. v. Detroit S. R. R.*, 10 Int. Com. Rep. 422.

⁴ *Rea v. Mobile & O. Ry.*, 7 Int. Com. Rep. 43.

⁵ *In re Restricted Rates*, 20 I. C. C. R. 426.

⁶ *Arkansas Pass Channel & D. Co. v. G. H. & S. A. Ry.*, 27 I. C. C. 403.

⁷ *Franke Grain Co. v. I. C. R. R. Co.*, 27 I. C. C. 625.

⁸ *Paine Lumber Co. v. C., C., & St. L. Ry.*, 27 I. C. C. 625.

⁹ *Gough & Co. v. I. C. R. R.*, 15 I. C. C. 280.

¹⁰ *Peale, P. & K. v. Central R. R. Co. of N. J.*, 18 I. C. C. 25.

which forbade the sending of its own cars beyond its own line during a period of congestion of business, where no notice of the rule by reference in a tariff, had been brought to the shipper.¹¹ It was held under the original provision of the Act that the privilege of free cartage at a certain station, which had been openly and notoriously granted for many years and was well known to all who would have occasion to rely on it, need not be posted, though it might be within the power of the Commission to order such posting.¹² But to a criminal prosecution under the Act as amended against a railroad for accepting from a shipper less than the published rate filed with the Commission, it has been held no defense that the carriers had spread broadcast among the shippers of the country an announcement that a lower rate would be accepted than the one scheduled, when in fact such rate had not been filed and published as required by the Act.¹³

§ 817. Where rates must be posted.

Posting a notice in a station or depot that the tariff sheets of the railroad company may be found in some other place is not a compliance with the Act.¹⁴ But it should be noted that section 6 gives the Commission a certain discretion to modify the provision as to posting.¹⁵ In an indictment under the Elkins Act against a shipper for accepting concessions, it is sufficient for the government to prove posting and publishing of the tariff at the station where the freight is received for transportation, and it is not required to prove that the carrier had posted and published the same at every station on its line.¹⁶ The publication of inland joint tariffs for the transporta-

¹¹ *Schwager & Nettleton v. Great Northern Ry.*, 12 I. C. C. 521.

¹² *Interstate Commerce Commission v. Detroit, G. H. & M. Ry.*, 167 U. S. 633, 17 Sup. Ct. 986.

¹³ *U. S. v. Merchants' & Miners' Transp. Co.*, 187 Fed. 363.

¹⁴ *Johnson v. C., S. P., M. & O. Ry.*, 9 Int. Com. Rep. 221.

¹⁵ *Franke Grain Co. v. I. C. Ry.*, 27 I. C. C. 625.

¹⁶ *United States v. Standard Oil Co.*, 170 Fed. 988.

tion of foreign merchandise, and of advances and reductions, should be made by posting in a public place at the depot of the carrier where the freight is received in the port of entry, and also where it is delivered at the place of destination in the United States.¹⁷ A rate, filed with the Commission, but not posted at station, was in one proceeding held unreasonable to extent that it exceeded the combination of the locals.¹⁸ But a failure to post a tariff which did not contain a change of the rate in question was held not to be the basis for reparation.¹⁹

§ 818. Posting distinguished from filing.

Posting in itself is not a condition to making a tariff legally operative, and is not a condition to the continued existence of a tariff once legally established by filing. The consequences of failing to file have been distinguished by the courts from the penalties for failing to post. A rate may be an established one, so that an offense would be committed by charging less than the rate, even though the rate has not been posted as required by this section.²⁰ Where an indictment against a shipper for obtaining rates lower than the lawfully published rate fails to allege that the published rates were posted for public inspection, as required by the Act, a demurrer to such an indictment will not be sustained.²¹ In accordance with this view of the matter it has been held that damages cannot be recovered on account of the failure to have a proper tariff posted at its stations.²² Even when posted, a rate was not considered by one of the earlier cases to be such a matter of public knowledge that ordinary shippers can be charged with knowledge of it.²³ But it is now well established that

¹⁷ New York Bd. of Tr. & Transp. v. P. R. R., 3 Int. Com. Rep. 417.

¹⁸ Alpha Portland Cement Co. v. P. R. R., 20 I. C. C. R. 640.

¹⁹ Fairbault Furniture Co. v. C. Gt. W. Ry., 25 I. C. C. 40.

²⁰ United States v. Howell, 56 Fed. 21.

²¹ United States v. Miller, 223 U. S. 599, 32 Sup. Ct. 323.

²² Illinois C. Ry. v. Henderson E. Co., 226 U. S. 441, 33 Sup. Ct. 176.

²³ Mobile & O. Ry. v. Dismukes, 94 Ala. 131, 10 So. 289.

if the rate is duly published and on file, shippers and consignees cannot depend for the lawful rate or charge upon what may be quoted by the carrier's agent, but must be guided by the published rate sheets themselves.²⁴ Failure to post may subject carriers to penalties, but it does not invalidate the tariff when it has been properly filed with Commission; for the posting of rates is not a condition to making a tariff legally operative.²⁵ If the rate charged was not a tariff rate, jurisdiction exists in the Commission to determine what would have been reasonable and award reparation.²⁶ And if there is no joint tariff, the law requires carriers subject to the Act to file such separately established rates and charges.²⁷

§ 819. Consequences of failing to file.

Whatever charges are made, whatever services are performed, and whatever privileges are allowed by carriers, must be stated separately in the schedules filed with the Commission.²⁸ A common carrier by contract may not impose upon itself any burden or grant any privilege, or perform any service, or make any allowance with respect to the traffic of a particular shipper except under the authority of its published tariffs, and then only when the burden is assumed or the privilege granted or allowance made to all shippers under like circumstances and similar conditions.²⁹ It follows that unless there is a tariff provision for the charges for services specially performed, the railroad cannot collect anything for rendering these services.³⁰ In one case it appeared that shippers customarily performed the service of loading, but the published tariffs made no provision for charges where the carrier

²⁴ *Suffern v. Indiana, D. & W. Ry.*, 7 Int. Com. Rep. 255.

²⁵ *Buren v. S. P. Co.*, 26 I. C. C. 332.

²⁶ *Goldenberg v. Clyde S. S. Co.*, 20 I. C. C. R. 527.

²⁷ *Eagle Pass Lumber Co. v. Nat'l Rys. of Mexico*, 25 I. C. C. 5.

²⁸ *Anderson, Clayton & Co. v. C., R. I. & P. Ry. Co.*, 18 I. C. C. 340.

²⁹ *General Electric Co. v. N. Y. C. & H. R. R. Co.*, 14 I. C. C. 237.

³⁰ *Beekman Lumber Co. v. L. & N. R. R. Co.*, 19 I. C. C. 343.

did the loading; the carriers loaded the cars in question and collected the less-than-carload rate, but it was held that such charge was unlawful, and complainant was entitled to reparation on the basis of the carload rate.³¹ In another case where it appeared that the defendant railroad charged the legal rate on grain and refunded to the shipper a certain amount per bushel for elevation service, performed by the shipper at the beginning of transportation; as the carrier's published tariff contained no such allowance, it was held that the railroad was criminally liable under the Elkins Law.³² The doctrine of the courts is that the provisions of section 15 of the Act, to the effect that shippers may be made an allowance by carriers for services rendered by them in connection with the transportation, relates only to services which the carrier has scheduled in its tariff rates, and published in accordance with section 6 of the Act.³³

§ 820. No practice legal without tariff provision.

It is altogether unlawful for a carrier to disregard the regular published tariff rates in making up any of its rates, and rely upon unpublished practices.³⁴ Likewise, all rules or regulations which, if enforced, would result in changing or affecting rates or charges shown on the published schedules must be notified to the public for the time required by law for other rate changes.³⁵ So a practice that grain may be shipped to an intermediate station, and there forwarded as a new shipment at a proportional rate lower than the local rate from that point, is a variation from the local published rate, and therefore illegal.³⁶ In consequence of these general principles, it follows that all transit privileges must be published in accordance

³¹ *Voorhees v. A. C. L. R. R. Co.*, 16 I. C. C. 42.

³² *Wisconsin Central Ry. Co. v. United States*, 169 Fed. 76.

³³ *Langdon v. Penna. R. R. Co.*, 194 Fed. 480.

³⁴ *Spillers & Co. v. L. & N. R. R.*, 8 I. C. C. Rep. 364.

³⁵ *Suffern v. Indiana, D. & W. Ry.*, 7 I. C. C. Rep. 255.

³⁶ *Re Rates and Practices of Mobile & O. Ry.*, 9 I. C. C. Rep. 373.

with section 6.³⁷ And it has often been pointed out by the Commission that demurrage is wrongfully collected where there is no tariff provision therefor.³⁸ Tariffs of the Santa Fe system not found to have provided for the absorption of switching charges at Hutchinson, on traffic milled in transit at that point, it was held improper to make such absorption.³⁹ Rates provided in tariffs on file with the Commission are the only legal rates, and rates provided in tariffs not on file are not valid.⁴⁰ The duly published rate is the legal rate for the shipping public until it is withdrawn under condemnation by the Commission or by the voluntary act of the carriers.⁴¹

§ 821. Devices to avoid the section.

A scheme to avoid the operation of this section will be futile. Thus, the device by which a published rate for carriage of coal from the mines of the carrier, which in the case of a favored consignee was made to include the price of the coal thus sold to the consignee by the carrier and delivered to him, is of course a violation of the Act.⁴² And deliveries of coal by an interstate carrier, under a contract to sell and transport such coal at a stipulated price, come within the requirement of the Act respecting the maintenance of published rates, whenever, from any cause, the gross sum realized is insufficient to yield the carrier its published freight rates after deducting the purchase price of the coal and the cost of delivery.⁴³ So where a railroad company (through a development company which it owned) bought grain in Kansas City, transported it to Chicago, and there sold it, the purpose being merely to transport it, and the varying profit on the

³⁷ Transit Case, 24 I. C. C. 340.

³⁸ Beekman Lumber Co. v. L. Ry. & N. Co., 19 I. C. C. R. 343.

³⁹ Hutchinson Mill Co. v. A., T. & S. F. Ry., 25 I. C. C. 180.

⁴⁰ St. Louis Blast Furnace Co. v. V. Ry., 24 I. C. C. 360.

⁴¹ Crescent Coal & Mining Co. v. C. & E. I. R. R., 24 I. C. C. 149.

⁴² Re Transportation of Coal and Mine Supplies, 10 I. C. C. Rep. 473.

⁴³ New York, N. H. & H. R. R. v. Int. Com. Comm., 200 U. S. 361, 26 Sup. Ct. 272.

transactions being the only real compensation for the carriage, this was held to be a departure from the published schedule and therefore illegal.⁴⁴ Where demurrage charges have been duly filed and published with the Commission, the carrier and the shipper cannot by agreement between themselves cancel such charges on the ground that the carrier's tracks were torn up and the shipper's tracks were in bad condition, thereby causing delays, or on the ground that such charges were discriminatory between competing shippers; and where the carrier and shipper knowing the published demurrage charges cancel the same, they are criminally liable under the Act.⁴⁵

§ 822. Only scheduled rates legal.

The requirements of the Act with respect to the publication, posting, and filing of all terminal charges, storage charges, icing charges and all other charges which the Commission may require, remove from the carrier and from the shipper the right which existed under the common law to contract in reference to any such charges, on any basis other than that specifically set forth in the carrier's published tariffs.⁴⁶ A carrier may not grant a trackage privilege to a shipper, unless it is authorized by its tariff and open to all shippers on equal terms.⁴⁷ A rate limited to shipments to be delivered within the New York lighterage limits is not applicable to a shipment not ordered to be delivered within the lighterage limits.⁴⁸ Whether carriers could be compelled to establish reciprocal switching arrangements has not been decided; but having entered into such an agreement under tariff authority, the carrier must accept shipments for delivery on the terms

⁴⁴ *In re Rates and Practices in the Transportation of Grain*, 7 I. C. C. Rep. 33. *tral R. R. Co. of N. J.*, 18 I. C. C. 25.

⁴⁵ *Lehigh Valley R. R. Co. v. United States*, 188 Fed. 879. ⁴⁷ *Beaumont & G. N. R. R. v. A., T. & S. F. Ry.*, 24 I. C. C. 161.

⁴⁶ *Peale, Peacock & Kerr v. Central R. R. Co. of N. J.*, 18 I. C. C. 40. ⁴⁸ *See Federal Sugar Refg. Co. v. B. & O. R. R.*, 17 I. C. C. 40.

of the schedule to extent of its capacity.⁴⁹ Indeed, according to the express terms of the Act one is unlawfully engaged in interstate commerce by carriage of traffic in respect of which no rate had been published and filed.⁵⁰ It follows that a shipper is entitled to insist upon no rate except that shown in carrier's schedule for the transportation of the commodity tendered for shipment.⁵¹

§ 823. Rate wars no excuse.

Reduction of passenger rates without consent of connecting lines over which tickets are sold, and without filing schedules thereof with the Commission is a violation of this section; and no necessity or compulsion is created by a war of rates which justifies disobedience of the Act.⁵² Contracts to the effect that rates shall be as low as those of competitors cannot be accepted as a basis for making rates.⁵³ Whatever may have been the practice in the past of "meeting the rate," tariffs must now be adhered to.⁵⁴ The carrier whose lawful tariff rate is higher than that of a competing line has no right to solicit or accept shipments, with the understanding or expectation that an order of reparation will be sought at the hands of the Commission, for the purpose of equalizing to the shipper a rate which he could have secured by giving his shipment to another carrier.⁵⁵ The Commission has appreciated the evils resulting from rate wars; and it has often pointed out that until it is given power to fix minimum rates it will not be able to handle the situation as it would like to.

⁴⁹ *Crescent Coal & Mining Co. v. B. & O. R. R.*, 20 I. C. C. 559.

⁵⁰ *Maxwell v. W. F. & N. W. Ry.*, 20 I. C. C. 197.

⁵¹ *Ford & Co. v. M. E. R. R.*, 19 I. C. C. 507.

⁵² *In re Passenger Tariffs and Rate*

Wars, 2 Int. Com. Rep. 340, 2 I. C. C. 513.

⁵³ *Menefee Lumber Co. v. T. & P. Ry.*, 15 I. C. C. 49.

⁵⁴ *In re Express Rates*, 28 I. C. C. 132.

⁵⁵ *Swift & Co. v. C. & A. Ry.*, 16 I. C. C. 426.

Topic B. Departure from Published Rates

§ 824. Reparation for improper charges.

Where a shipper has paid charges for transportation service, alleged to have been improper, it is a case for the Commission to decide the reasonableness of the charges, and to award reparation.⁵⁶ But where shipments have been made with the agreement that rate published should be reduced and reparation thereafter given, the Commission will refuse to sanction any such deal.⁵⁷ If the situation whereby the shipper was forced to pay the tariff rate of the carrier is one which bears unjustly upon the shipper by reason of the fault of the carrier, a showing to this effect makes a typical case for resort to the Commission subsequently for reparation. Thus if a larger car is furnished to a shipper than the size he ordered the minimum should only be based on the car ordered.⁵⁸ And so if one large car is ordered, and two smaller ones are sent, the basis of the minimum is the car ordered.⁵⁹ If, on the other hand, complainant's error in making out the shipping ticket caused the shipment to go wrong, the carrier is not responsible, and the case will be dismissed.⁶⁰ The principle running through all the cases plainly is that in first instance a shipper must pay the carrier what the tariff fairly requires of him by proper interpretation, even if the carrier is willing to waive the provisions of his tariff.⁶¹ If then he can show that what he was compelled to do by the operation of this rule was prejudicial to him, he should have reparation for the wrong done him by the carrier.

§ 825. Certain technical points discussed.

A carrier should not be penalized for a purely technical

⁵⁶ Maxwell v. W. F. & N. W. Ry.,
20 I. C. C. 197.

⁵⁷ Armour Car Lines v. So. Pac.
Co., 17 I. C. C. 461.

⁵⁸ Hanna Coal Co. v. Nor. Pac.
Co., 16 I. C. C. 239.

⁵⁹ Jobbins v. C. & N. W., 17 I. C. C.
297.

⁶⁰ Evens & H. Fire Brick Co. v.
W. R. R., 26 I. C. C. 152.

⁶¹ Blum Lumber Co. v. So. Pac.
Co., 18 I. C. C. 430.

omission or error made in an effort to bring its tariff into conformity with the regulations.⁶² The carrier should be considered blameless, if it has relied upon the terms of a schedule which could not reasonably be misunderstood.⁶³ On the other hand, if the carrier is to blame for the way in which the schedule is framed, and the error in the tariff has resulted in loss to the shipper, damages will be awarded.⁶⁴ Where a class rate tariff contained no reference to a commodity rate tariff, it was held that a mere technical omission did not invalidate the commodity issue.⁶⁵ But it is matter of substance not of form which requires that local rates when applied to interstate business must be filed with the Commission.^{65a} However it has been decided that the factor of intermediate rates not on file with Commission, and used in absence of through rate may be held unreasonable.⁶⁶ Nothing is better established than that a rate once scheduled is put beyond any arguing between the carrier and the shipper as to its propriety or impropriety; if the carrier should concede its unreasonableness it would be illegal for the shipper to accept this concession.⁶⁷ Indeed, under the system now prevailing nothing but fidelity to the schedule can save the carrier from prosecution for violation of the Act for charging less than the rates filed with the Commission.⁶⁸

§ 826. Criminal liability for violation.

The Act requires publication and maintenance of definite transportation charges; it is the law that carriers shall publish their tariffs and adhere to these tariffs.⁶⁹ It was believed that in no other way could the discriminations

⁶² *Highland Pk. M'fg Co. v. So. Ry.*, 26 I. C. C. 67. of Miss. River, 8 Int. Com. Rep. 185.

⁶³ *Mercantile Lumber & Supply Co.*

⁶⁴ *Sanders v. C. M. & St. P. Ry.*, v. St. L. S. W. Ry., 28 I. C. C. 701. Unrep. op. 672.

⁶⁵ *Old Dominion C. & S. Co. v.*

⁶⁶ *Bowles & McCandless v. L. & N. R. R.*, 19 I. C. C. R. 563. P. R. R., 17 I. C. C. 309.

⁶⁷ *Voorheds v. O. C. L. Ry.*, 16

⁶⁸ *Highland Park M'fg Co. v. S. Ry.*, 26 I. C. C. 67. I. C. C. 42.

⁶⁹ *In re Restricted Rates*, 20 I. C. C.

^{65a} *Re Export Rates East & West* R. 426.

which had formerly existed be prevented; and in the enforcement of these provisions the Commission has no discretion.⁷⁰ The intention of Congress is, in the absence of express exceptions, to prevent a departure from the published schedules in all manner of carriages, whether gratuitous or otherwise.⁷¹ A carrier cannot depart to any extent from its published schedules of rates for interstate transportation on file without incurring the penalties of the statutes.⁷² The law places the same obligation upon the shipper as upon the carrier to observe lawful tariff provisions; and so it would seem that a false representation of the contents of a package on the part of the shipper is prohibited by the law.⁷³ Where a carrier willfully and knowingly demands and receives storage charges against a shipper for car detained at a point other than the customary and usual place of delivery or point of destination, it is criminally liable under the Act.⁷⁴ In view of the express provision that no transportation shall be performed save in pursuance of schedules on file, the Commission will be vigilant to see that criminal prosecution is the result of any flagrant violation.⁷⁵

§ 827. Essentials of the crime.

Under the Elkins Act, the acceptance by a carrier of a less sum of money than that named in its tariff for the transportation of property is a departure from the legal rate; and it is no defense against a criminal prosecution that the carrier does so in compromise of claims for loss of property in transit.⁷⁶ The language of the Act being no carrier shall charge, or demand or collect, or receive a

⁷⁰ *Ames Bros. Co. v. Rutland R. R.*, 16 I. C. C. 479.

⁷¹ *American Express Co. v. U. S.*, 212 U. S. 522, 29 Sup. Ct. 315, 53 L. ed. 635.

⁷² *L. & N. R. R. v. Mottley*, 219 U. S. 467, 31 Sup. Ct. Rep. 265, 55 L. ed. 297.

⁷³ *Bannon v. Southern Express Co.*, 13 I. C. C. 516.

⁷⁴ *United States v. Texas & P. R. R.*, 185 Fed. 820.

⁷⁵ I. C. C. Conference Ruling, No. 184.

⁷⁶ *United States v. Atchison, T. & S. F. Ry.*, 163 Fed. 111.

greater or less or different compensation, it has been held that a railroad is criminally liable for merely demanding storage charges in excess of those lawfully applicable.⁷⁷ Where in prosecution under the Elkins Act the indictment averred that the defendant carrier over whose line the shipment was made had established and published rate over its line of 19½ cents and the proof showed that the tariffs and schedules filed specify 18 cents over the defendant's route, it appearing that the 19½ cent rate was made up by adding to the 18 cent rate the 1½ cent rate of another independent carrier, there was held to be a fatal variance between the allegations and the proof.⁷⁸ And where an indictment alleged that the published rate on lime was \$70 a carload, the allegation was held not to be sustained by a showing from the published tariff that the rate was \$3.50 per ton in carloads of at least 40,000 lbs., the charges to be assessed at \$3.50 per ton on actual weight on shipments exceeding 40,000 lbs., as these variant conditions might be material in determining whether or not there had been a violation of the Act.⁷⁹

§ 828. Requirements relating to filing.

One of the chief purposes of the filing is to call the attention of the Commission to a proposed change in rates.⁸⁰ As the Commission has pointed out, it is necessary that all rates should be on file with it for study and comparison, if its regulation is to be intelligent and comprehensive.⁸¹ It follows that rates provided in a tariff which is not on file with Commission are not legal rates.⁸² And, as the protection of the shipper is a matter which the Act has also in mind, damages will be awarded for loss sustained

⁷⁷ *United States v. Texas & P. R. R.*, 185 Fed. 820.

⁷⁸ *United States v. Standard Oil Co.*, 170 Fed. 977.

⁷⁹ *Atchison, T. & S. F. Ry. v. United States*, 170 Fed. 250.

⁸⁰ *In the Matter of Proposed Ad-*

vances in Freight Rates, 9 Int. Com. Rep. 382.

⁸¹ *Re Atlanta & W. P. R. Co.*, 2 Int. Com. Rep. 480, 3 I. C. C. Rep. 75.

⁸² *St. Louis Blast Furnace Co. v. V. Ry. Co.*, 24 I. C. C. 360.

through failure to post a tariff changing rates.⁸³ A tariff filed by the authorized agent of a carrier has the same legal status as though separately published and filed by the carrier.⁸⁴ If a tariff making reductions is in due form and legally filed, whether it was filed without proper authority is immaterial,⁸⁵ if the proof shows that it has been regularly used by the defendant carrier. The necessity of establishing and maintaining a steady, uniform, open tariff rate is of paramount importance, in view of the evils which the Act to Regulate Commerce attempts to correct, and obviously the most efficient method of regulation is the requirement of constant publicity.

§ 829. Conclusive presumption of legality.

The filing of schedules of rates with the Commission, as required by the Act, raises no presumption as to the legality of such rates in any proceedings before the Commission.⁸⁶ But, as has been seen, the result of the provisions of this section is that in all dealings between shipper and carrier, whether out of court or in court, except in a proceeding before the Commission to have the rates altered, the rate so filed with the Commission must be taken as the reasonable rate.⁸⁷ Whether or not the shipper knows or does not know what the rates in force are, he is bound thereby and answerable therefor; and as will be seen later the doctrine that the scheduled rate is the only legal rate is pressed to the extent of holding that the shipper must pay that rate, even if he was given to understand that the rate was lower.⁸⁸ Thus the fact that a shipper is

⁸³ *Canadian Valley Grain Co. v. C., R. I. & P. Ry.*, 19 I. C. C. 108.

⁸⁴ *Johnson & Co. v. A., T. & S. F. Ry.*, 21 I. C. C. 637.

⁸⁵ *Bd. of Tr. of Chicago v. I. C. R. R.*, 26 I. C. C. 545.

⁸⁶ *San Bernardino Bd. of Trade v. Atchison, T. & S. F. R. R.*, 3 Int. Com. Rep. 138.

⁸⁷ One of the first cases to appre-

ciate this was *Van Patten v. Chicago, M. & S. P. Ry.*, 81 Fed. 545. See *Texas & P. Ry. v. Mugg*, 202 U. S. 242, 50 L. ed. 1101, 26 Sup. Ct. 268, for this doctrine in its latest development.

⁸⁸ The first intimation of this was in *Kinnavey v. Terminal R. R.*, 81 Fed. 802. See *Texas & P. Ry. v. Abilene Cotton Oil Co.*, 204 U. S.

not given personal notice of the promulgation of a carrier's regulations neither vitiates the latter's right nor lessens its duty to impose charge incurred under the rules contained in its lawful tariff.⁸⁹ The full scope of this doctrine of the finality of the scheduled rate until it is altered by the Commission is fully discussed in a later chapter dealing with its quasi-judicial powers.

§ 830. Of whom filing required.

The law lays upon carriers the duty to publish and file rates applicable to the interstate traffic in which they participate.⁹⁰ But special rates or fares for property or troops for the federal government need not be filed, as such transportation is expressly excepted from the provisions of the Act.⁹¹ Where a terminal railroad lying wholly within a State, but engaged in the transportation of property moving wholly by railroad from one State to another, joined in the transportation of an interstate shipment without first filing a schedule of rates applicable to the shipment with the Commission, it was held that under the Act as amended it was criminally liable.⁹² But a railroad doing only local businesses and entering into no through arrangements, either by billing through or dividing rates, need not file its schedules.⁹³ The Commission will not recognize as common carriers lines that do not publish tariffs in lawful form or concur properly in lawful tariffs of other lines or that do not in all other respects comply with the law.⁹⁴ Such carriers cannot demand the establishment of through rates unless they are ready to submit themselves to the jurisdiction of the Commission in this

426, 51 L. ed. 553, 27 Sup. Ct. 709, for this doctrine in its latest development.

⁸⁹ *Peale, P. & K. v. Central R. R. Co. of N. J.*, 18 I. C. C. 25.

⁹⁰ *Aransas Pass Channel & Dock Co. v. G. H. & S. A. Ry.*, 27 I. C. C. 403.

⁹¹ *United States v. So. Pac. Ry.*, 25 I. C. C. 255.

⁹² *United States v. Illinois Terminal R. R.*, 168 Fed. 546.

⁹³ *Interstate Commerce Commission v. Bellaire Z. & C. Ry.*, 77 Fed. 942.

⁹⁴ *Star Grain & Lumber Co. v. A., T. & S. F. Ry.*, 17 I. C. C. 338.

respect.⁹⁵ A railroad lying wholly within a State which stands off from its connections at its terminals and deals with them as it would with consignors or consignees is not obliged to report to the Commission.⁹⁶ But a junction railway which is by intercorporate relationships involved with the terminal movement of interstate commerce must conform to the requirements of the Act as to fidelity to tariffs.⁹⁷

§ 831. Provisions cannot have retroactive effect.

It has been sometimes attempted, but always in vain to give a retroactive application to tariff provisions, for some reason or other, good or bad.⁹⁸ The Commission is positive in holding that no such retroactive application can be sanctioned.⁹⁹ Tariffs cannot be made to apply to conditions, other than those existing upon the date when such tariffs became effective.¹ It follows that a tariff canceling a privilege does not affect shipments that began to move prior to such cancellation.² For the rate in effect at the time a shipment begins to move is the rate lawfully applicable.³ If subsequent to the shipments in question a tariff is filed making such allowance, and if the carrier admits the unreasonableness of the rates charged to the extent of such allowance, it may be held that reparation should be awarded on the basis of the allowance made in the subsequently published tariff.⁴ In other words, although any change must be prospective, and cannot be retroactive, still what is being done in the future may have its bearing upon what ought to have been done in the past. But the Commission will scrutinize any

⁹⁵ *Enterprise Transp. Co. v. Penna. Ry.*, 12 I. C. C. 326.

⁹⁶ *United States v. Chicago, K. & S. Ry.*, 81 Fed. 783.

⁹⁷ *United States v. Union S. Y. Co.*, 226 U. S. 286, 33 Sup. Ct. 83.

⁹⁸ *Victor Fuel Co. v. A., T. & S. F. Ry.*, 14 I. C. C. 119.

⁹⁹ *Rosenbaum Bros. v. B. & O. R. R.*, 24 I. C. C. 287.

¹ *Cady Lumber Co. v. M. P. Ry.*, 19 I. C. C. 12.

² *In the Matter of Through Routes*, 12 I. C. C. 163.

³ *Transit Case*, 25 I. C. C. 130.

⁴ *Kaye & Carter Lumber Co. v. C., M. & St. P. Ry.*, 14 I. C. C. 604.

matter of this sort to see whether, perhaps, what is being worked out is some understanding with some shippers it is desired to favor.

§ 832. Schedules working changes in rates.

Shippers are charged with knowledge of the law as to the manner in which transportation rates may be changed; and a change in rates on short notice, under authority of Commission affords no basis for reparation for damage to the complainant in a business way.⁵ The lawfully established rate remains in force until specifically canceled according to an obvious rule in dealing with this matter. Where the initial carrier's advanced rate tariff did not cancel lower rate named in tariff of another carrier to which initial carrier was a party, the lower rate was held to be the legal rate.⁶ Canceling a rate whereby a previously scheduled higher rate is left in effect is an advance in rates, and will be treated as such under the Amendment of 1910.⁷ If a rate is advanced while oil is at refining-in-transit point the legal rate is the rate in effect at the time of the original movement.⁸ And it has been held that a failure to post a supplement to a tariff which contained no change as to rates affords no basis for an award of reparation.⁹ As for the occasion for the exercise of the power of the Commission to shorten the normal period of notice of change of rates, it may be noted that permission may be granted to correct an error in tariff on less than statutory notice.¹⁰ In one case the circumstances were so unusual that the Commission granted permission to change the tariffs, which may be made effective upon one day's notice.¹¹

⁵ Wisconsin Lime & Cement Co. v. C., C., & St. L. Ry., 25 I. C. C. 366.

⁶ Stilwell v. L. & H. R. Ry., 19 I. C. C. 404.

⁷ Re Advances on Cotton Seed Products, 25 I. C. C. 237.

⁸ Southern Cotton Oil Co. v. A. C. L. R. R., 19 I. C. C. R. 434.

⁹ Faribault Furniture Co. v. C. G. W. R. R., 25 I. C. C. 40.

¹⁰ Buren v. So. Pac. Co., 26 I. C. C. 332.

¹¹ Transcontinental Commodity Rates, 26 I. C. C. 456.

§ 833. Invalidity of varied rate.

A shipper who is compelled to pay charges in excess of those set forth on the published rate schedules, because of rules prescribed by the railroad company in circulars as to maximum and minimum carload weights, is entitled to recover the same back from the company.¹² Recently the Commission has been very clear that the published rate must be paid and collected regardless of rate quoted.¹³ On the other hand, if collected by the carrier, unpublished charges, and those in excess of published charges, must be refunded.¹⁴ An unpublished agreement between shipper and carrier cannot be basis of award of damages by Commission; the Commission can award damages only where there has been a violation of the Act.¹⁵ The fact that there may have been contractual obligations resting upon the vendor and vendee cannot excuse the defendants from the collection and retention of the lawful tariff charges.¹⁶ And the fact that there have been past violations of tariffs constitutes no right to demand anything else in the future than the schedule itself.¹⁷ The effect of a violation of the Act is to make the contract of carriage, including the rate named therein, invalid. The carrier therefore cannot be sued for breach of an executory term of the contract.¹⁸ This principle, however, applies only to a claim which must be based on the illegal contract. The granting of a rebate contrary to the provision of the interstate commerce law does not render the bill of lading void, so that no action can be maintained against the carrier for loss of the goods by negligence.¹⁹

¹² *Suffern v. Indiana, D. & W. Ry.*, 7 Int. Com. Rep. 255.

¹³ *Scott v. T. & N. O. R. R.*, 20 I. C. C. 167.

¹⁴ *Northern Lumber M'fg Co. v. T. & P. Ry.*, 19 I. C. C. R. 54.

¹⁵ *Wood-Mosaic Flooring & Lumber Co. v. L. & N. R. R.*, 22 I. C. C. 458.

¹⁶ *America Brake Shoe & Foundry*

Co. v. A. G. S. R. R., 26 I. C. C. 446.

¹⁷ *Indianapolis Freight Bureau v. C., C., C. & St. L. Ry.*, 15 I. C. C. 370.

¹⁸ *Interstate Commerce Commission v. Chesapeake & O. Ry.*, 128 Fed. 59; *Red Cloud Mining Co. v. Southern Pac. Co.*, 9 I. C. C. Rep. 216.

¹⁹ *Merchants' C. P. & S. Co. v.*

§ 834. Stipulations in bills of lading.

It should be noted that as the section reads the carrier receiving property for interstate transportation shall issue a bill therefor, and be liable to the lawful holder thereof for any loss, damage, or injury to such property.²⁰ Rates are governed by published tariffs and not by notations made on bills of lading.²¹ Carriers cannot deliver, until bills of lading are properly surrendered.²² The provision in a bill of lading limiting the responsibility of the carrier to the "shipper's load and count" involved too wide a question of law for the Commission to assume authority to pass upon it.²³ A carrier may insist upon issuing a separate bill of lading for each car; but if it issues one bill of lading for a shipment consisting of several cars it cannot collect demurrage until the whole shipment is tendered for delivery.²⁴ The actual point of origin, and not point from which shipment is billed, determines the rate.²⁵ The binding effect upon carriers of instructions contained in bills of lading has recently been a matter of discussion before the Commission.²⁶

§ 835. Limitations of legal obligations.

It may be premised that a carrier cannot by tariff provision exempt itself altogether from all liability whatsoever to shippers for loss of property in transit.^{26a} If a rate is conditioned upon a shipper's agreeing that the carrier shall be under no liability to answer for losses, formerly the stipulation was valid when the loss occurred through

Insurance Co. of North America,
151 U. S. 368, 38 L. ed. 195, 14
Sup. Ct. 367.

²⁰ Coal Rates on the Stony Fork
Branch, 26 I. C. C. 168.

²¹ Pole Stock Lumber Co. v. G. &
S. I. R. R., 26 I. C. C. 451.

²² Leo P. Harlow, Trustee, v. W.
S. Ry., 26 I. C. C. 511.

²³ Western Classification Case, 25
I. C. C. 442.

²⁴ Scudder v. T. & P. Ry., 22
I. C. C. 60.

²⁵ Preston v. C. & O. Ry., 19 I. C.
C. 406.

²⁶ Jackson & Perkins v. S. P. Co.,
24 I. C. C. 323.

^{26a} In re Express Rates, 28 I. C. C.
132.

causes beyond the carrier's control; but the stipulation was void as against loss due to the carrier's negligence or other misconduct.^{28b} There is no lawful authority for a tariff provision establishing two rates for same transportation service and same liability in connection therewith.^{28c} The initial carrier should not only advise shipper of lower rates applying in case of release of valuation, but, when informed of the shipper's desire to avail himself of such lower rates, should obtain the shipper's signature in accordance with the tariffs.^{28d} Even since the sweeping provisions of the Carmack Amendment against all limitation of liability for loss, a stipulation in a shipping contract limiting the carrier's liability in case of the loss of an interstate shipment of cattle to the agreed value of \$20 for each cow, made to secure the lower of two rates on file with the Commission, has been held not forbidden by the provisions of this amendment prohibiting exemptions from the liability.^{28e} The latest case on this point goes so far as to hold that if the property is apparently of greater value than the limitation, and no notice of the requirement in the tariff that a higher value must be declared has come to the owner, still the scheduled provisions govern the situation and no more than the amounts stated therein on the conditions named can be recovered.^{28f}

Topic C. Joint Tariffs and Schedules

§ 836. Meaning of joint tariff.

Two kinds or classes of routes are recognized and provided for, namely, the line of a single carrier, and a continuous line or route operated by more than one carrier where the participating carriers establish joint rates or

^{28b} *In re Released Rates*, 11 I. C. C. 550.

^{28c} *C. H. Algert Co. v. D. & R. G. R. R.*, 20 I. C. C. 93.

^{28d} *Western Classification Case*, 26 I. C. C. 442.

^{28e} *Missouri, K. & T. R. R. v. Hamman Bros.*, 227 U. S. 637, 33 Sup. Ct. 397.

^{28f} *Boston & M. R. R. v. Hooker*, 233 U. S. 97, 34 Sup. Ct. 526.

charges for such continuous line or route. Joint through routes and rates are ordinarily the subject of agreement between the participating carriers; but when this is established, and until finally abrogated or changed, they are required by the statute to be kept open to public use.²⁷ The publication by a carrier subject to the Act of the aggregate local rates between points on its own line and those on the line of a connecting carrier with which it has no joint tariff, is not illegal; but it cannot lawfully add to the duly established rates of another carrier any amount it pleases less than its own rate, and publish and use that sum as a through rate, without the consent of the other company. Such a through rate is not a joint rate, for joint rates can be made only by concurrence or assent; nor is it a combination rate, for one of its component parts has no legal existence or sanction as a separate or local charge, and there must be lawful rates upon both the roads before there can be a lawful combination of rates.²⁸ There is a decision in a State court to the effect that a combination rate, not being a joint rate, need not be posted, and is not subject to the Act.²⁹ But when rates established to apply between points within a single State are applied as part of combination rates on transportation between different States, such State rates, as well as the interstate rates with which they are combined, must be published at stations and filed with the Commission.³⁰

§ 837. Making and filing jointly.

Any one member of a joint combination may file copies of joint tariff for all the members.³¹ And where one carrier files and properly publishes a joint tariff, he is not

²⁷ Consolidated Forwarding Co. v. Southern Pacific Co., 9 Int. Com. Rep. 182.

²⁸ New York, N. H. & H. R. R. v. Platt, 7 Int. Com. Rep. 323.

²⁹ Gulf, C. & S. F. Ry. v. Nelson (Tex. Civ. App.), 23 S. W. 732.

³⁰ Re Export Rates from Points East and West of Miss. River, 8 I. C. C. Rep. 185.

³¹ Re Filing Copies of Joint Tariff, 1 Int. Com. Rep. 76, I. C. C. 225.

affected by the failure of other carriers properly to publish it.³² The tariffs need not be filed at a non-competing point.³³ A railway stage route and hotel association are not connecting carriers who can make and file a joint tariff.³⁴ The schedule having failed to limit rates published in tariff to certain routes the rate applies via the lines of all carriers parties to the tariff.³⁵ Where an initial line publishes and maintains one joint tariff which is not properly concurred in by its connections, and at the same time another joint tariff naming higher rates and properly concurred in, the latter tariff names the legal rate and must be applied.³⁶ There is not what can be considered a through route and joint rate where one of connecting roads has not filed a tariff with Commission.³⁷ The initial carrier is liable in reparation, where it published a joint through rate in which connecting lines had not concurred, the combination rate legally applied being found unreasonable.³⁸ An attempt to connect outbound interstate movements with inbound movements to a concentrating point under rates not on file with Commission is unlawful.³⁹ Any lawful charge or any factors making up by combination a lawful charge must be duly scheduled.⁴⁰ By a rule of construction of schedules, where there are two rates—one a joint rate and the other a combination rate—the joint rate is the legal rate.⁴¹

§ 838. What particulars must be published.

It was at first held that the published tariff should

³² *Virginia C. & I. Co. v. Louisville & N. R. R.* (Va.), 37 S. E. 310.

³³ *Chicago & N. W. Ry. v. Osborne*, 52 Fed. 912.

³⁴ *Wylie v. Northern Pac. R. R.*, 11 I. C. C. Rep. 145.

³⁵ *Kennedy & Co. v. St. L. S. W. Ry.*, 22 I. C. C. R. 277.

³⁶ *St. Paul Board of Trade v. M., St. P. & S. Ste. M. Ry.*, 285.

³⁷ *Fish & Co. v. N. Y. C. & St. L. R. R.*, 19 I. C. C. 452.

³⁸ *Texico Transfer Co. v. L. & N. R. R.*, 20 I. C. C. R. 17.

³⁹ *St. Paul Board of Trade v. M., St. P. & S. Ste. M. Ry.*, 19 I. C. C. 285.

⁴⁰ *Kile & M. v. D. Ry.*, 15 I. C. C. 235.

⁴¹ *Arabol M'fg Co. v. S. B. Ry.*, 25 I. C. C. 429.

definitely name all the participating roads and indicate the various routes by which they undertake to afford transportation at designated rates. Theoretically, at least, it said, such a disclosure is necessary to a complete statutory joint tariff. And it was ordered that all carriers concerned should file an acceptance of the tariff.⁴² But the Supreme Court of the United States finally held that the carrier publishing a through tariff might reserve the right to route the goods as it pleased beyond its own terminal.⁴³ However, by a subsequent amendment to the Act it is provided that the tariff naming joint through rates should show the number of the routes and give the shipper his choice.⁴⁴ A carrier published a joint tariff, showing it could make delivery on track of carrier from whom it had not obtained concurrences; the consignee paid the drayage charges on the shipment, which the connecting line refused to deliver without payment of switching charges, and it was held that these drayage charges constituted the measure of damage.⁴⁵ All this is consequent upon the rule that carriers cannot engage in through transportation without publication of definite and specific rates, including all services incident to through movement.⁴⁶

§ 839. Rates based upon combinations.

It is fundamental that there can be but one legal rate between two points. This rate must be the local rate if over one road, or the joint rate if over a through route composed of two or more roads which have agreed to a joint rate, or a combination of separately established rates applicable on through business over a through route which does not enjoy a joint rate.⁴⁷ Where a through

⁴² In re Form and Contents of Rate Schedules, 6 I. C. C. Rep. 267.

⁴³ Southern Pacific Co. v. Int. Com. Comm., 200 U. S. 536, 26 Sup. Ct. 330.

⁴⁴ See Express Rate Cases, 24 I. C. C. 380.

⁴⁵ Edison Portland Cement Co. v. D., L. & W. R. R., 22 I. C. C. 382.

⁴⁶ Hampton M'fg Co. v. Q. D. S. S. Co., 27 I. C. C. 666.

⁴⁷ Laning-Harris Coal & Grain Co. v. Missouri P. R., 11 I. C. C. 154

rate is published it governs the situation, even making unavailable a proportional rate, which could otherwise be used in getting a favorable combination.⁴⁸ Where no joint rate is lawfully fixed the duty of the carriers is to apply the lowest combination of intermediate rates.⁴⁹ There is no other rule possible than that in absence of a joint through rate, the combination of locals constitutes the through rate.⁵⁰ A carrier failing to route goods so as to give the shipper the advantage of the lowest combination by any natural route will be held responsible in reparation proceedings.

§ 840. What combinations are justified.

It is not asked to post at stations all factors in local combinations with others, only the joint rates in force from that point.⁵¹ A factor in a combination not on file with Commission, and used in absence of through rate may be set aside.⁵² It is the carrier's own tariff, in the theory here applied, not that of its connections which governs.⁵³ Rates not filed with the Commission are not lawful factors in combinations.⁵⁴ A rate between two points in a State to be applicable to a shipment beyond out of the State must be filed with this Commission.⁵⁵ Where an initial carrier publishes a joint tariff, which is not properly concurred in by its connections, it is ineffective as such.⁵⁶ Where a carrier filed and posted tariff stating a through rate to points on a line, which was not named as a party and had not concurred, it was held that charges would be collected on the basis of the combination of these

⁴⁸ *Lindsay Bros. v. B. & O. S. W.*, 16 I. C. C. 6.

⁴⁹ *Alpha Portland Cement Co. v. P. R. R.*, 20 I. C. C. 640.

⁵⁰ *Fish & Co. v. N. Y. C. & St. L. R. R.*, 19 I. C. C. 452.

⁵¹ *Canadian Valley Grain Co. v. Chicago & R. I. P.*, 18 I. C. C. 509.

⁵² *Mercantile Lumber & Supply*

Co. v. St. L. S. W. Ry., 28 I. C. C. 701.

⁵³ *Falls & Co. v. Chicago, R. I. & P. Ry.*, 15 I. C. C. 269.

⁵⁴ *Hagan Iron Co. v. Pennsylvania R. R.*, 18 I. C. C. 529.

⁵⁵ *Johnson v. M., St. P. & S. S. M. Ry.*, 22 I. C. C. 255.

⁵⁶ *Kennedy & Co. v. St. & S. W. Ry.*, 22 I. C. C. 277.

intermediates.⁵⁷ To attempt to avoid through rates by paying ticket rate to an intermediate point and the mileage rate beyond, must be accompanied with the conditions of the tariffs under which mileage is sold.⁵⁸ Naturally enough damages were denied on the basis of an unlawful contract, whereby a shipper was to receive the benefits of an unpublished division of a through rate.⁵⁹

§ 841. Whether export rates must be filed.

Rates on export traffic must be published and filed in accordance with the provisions of this section.⁶⁰ So-called through export rates, made by adding the ocean rate to the inland rail rates, are not analogous to railroad rates made by joint arrangement by railway carriers subject to the statute, in the sense that the total rate must be published and filed, and it is enough if the railroad carrier publishes and maintains its own rate to the seaboard.⁶¹ But if there is in fact such a joint arrangement that the rate is a joint rate under this section, then the entire through rate should be published, and not the inland division, which in that case might vary while the entire rate remained the same.⁶² It is now generally understood that if the carrier names export rates they must be filed, subject to the operation of the distinctions just stated, but otherwise as has been seen in a former chapter the Commission can have no concern with a rate applying outside of the United States.⁶³

§ 842. Divisions and proportional rates.

Divisions of the joint rates between the carriers concurring therein are matters of private agreement, and for

⁵⁷ *Morton Salt Co. v. M. L. & T. R. R. & S. S. Co.*, 28 I. C. C. 422.

⁵⁸ *In re Mileage Books*, 28 I. C. C. 318.

⁵⁹ *Beekman Lumber Co. v. St. L. & S. F. R. R.*, 21 I. C. C. R. 270.

⁶⁰ *Re Export & Domestic Rates on Grain*, 8 Int. Com. Rep. 214.

⁶¹ *Kemble v. Boston & A. R. R.*, 8 Int. Com. Rep. 110.

⁶² *Re Publication & Filing of Tariffs*, 10 Int. Com. Rep. 55.

⁶³ *New Orleans B. of T. v. Illinois Central Ry.*, 23 I. C. C. 465.

that reason, generally speaking, are of no special concern to shippers, nor are they essential to legalize a published through rate.⁶⁴ So far as charges on its own road are concerned, a carrier cannot be bound by tariffs of its connections in which it has not concurred; neither can it ignore the provisions of the tariffs of its connections with reference to charges for services performed by those connections.⁶⁵ In one proceeding the factor of the combination through rate from Memphis to Little Rock was not found unduly prejudicial as compared with the proportional rate on through shipments between the same points on traffic originating in different localities.⁶⁶ It was noted in another case that a special proportional rate applied to shipments to Milwaukee, when destined to points east of Illinois-Indiana State line.⁶⁷ A tariff provision for free reconsignment at a junction point to connecting lines where no through rates were in effect was not found applicable where a proportional rate was in effect.⁶⁸

§ 843. Parties liable to prosecution.

The concluding part of section 1 of the Elkins Act brings all the carriers who have participated in any rate filed or published within the terms of the Act, as much so as if the tariff had been actually published and filed by such participating carrier, so that a connecting carrier may be convicted of rebating for accepting a lower rate than the one filed with the Commission by the initial carrier.⁶⁹ In interpreting a schedule from which it was alleged there had been a departure, the court held that the route to which the tariff applied was the natural and direct route from Olean to Norwood by way of Rochester,

⁶⁴ *Germain Co. v. N. O. & N. E. R. R.*, 17 I. C. C. 22.

⁶⁵ *Hull Co. v. S. Ry.*, 24 I. C. C. 302.

⁶⁶ *Scott-Mayer Commission Co. v. C., R. I. & P. Ry.*, 28 I. C. C. 529.

⁶⁷ *Webster Grocer Co. v. C. & N. W. Ry.*, 19 I. C. C. 493.

⁶⁸ *Becker v. P. M. R. R.*, 28 I. C. C. 645.

⁶⁹ *United States v. N. Y. C. & H. R. R. R.*, 212 U. S. 509, 53 L. ed. 629, 29 Sup. Ct. 313.

and not the roundabout route by Buffalo, and that the tariff was therefore sufficiently definite to establish the rate specified over the former route, in a criminal prosecution under the Elkins Act for accepting a concession.⁷⁰ An indictment which alleges that the transportation was pursuant to a common arrangement for a continuous shipment and that the concession was for a part and not from the aggregate rate for the interstate transportation, is not defective, since it is not necessary to the offense that all connecting carriers should join in giving the concession.⁷¹ In the most famous of these cases against the companies allied with the Standard Oil combination it was held that the defendant Indiana Company was not guilty under the Elkins Act of securing transportation at less than the published rates, since the charges paid by it for the portions of the haul between Evansville and Grand Junction and Grand Junction to destination were the lawfully published divisions of the legal rate from Whiting to Birmingham.⁷²

Topic D. Form of Schedules Required

§ 844. Clearness of statement.

The publication of tariffs in convenient form, adequate in statement and properly authenticated, is essential to the enforcement of reasonable rates and impartial treatment. So far as possible the schedules should be simple in arrangement, ample in their disclosures, and free from ambiguity. Otherwise the opportunity is afforded for evading the law by discriminating practices and unjust exactions.⁷³ The rate sheets must be readily intelligible to shippers and consignees.⁷⁴ They must be so simplified that persons of ordinary comprehension can understand them; and a

⁷⁰ *Standard Oil Co. of N. Y. v. United States*, 179 Fed. 614.

⁷¹ *United States v. Vacuum Oil Co.*, 158 Fed. 536.

⁷² *United States v. Standard Oil Co. of Ind.*, 183 Fed. 223.

⁷³ *Re Rate Schedules*, 6 Int. Com. Rep. 267.

⁷⁴ *Johnston-Larimer D. G. Co. v. Atchison, T. & F. R. R.*, 6 Int. Com. Rep. 568.

notation in the tariff of one carrier, making reference to the tariff of some competing carrier, does not meet the requirement of the law that the rate charged shall be published and filed.⁷⁵ The mere designation, in a paper or circular, of the means of arriving at rates by calculation or reference to other papers, does not constitute the rate sheet required; and the reissuing by a carrier of a tariff of another line, and, by a supplement concurrently issued, limiting its use of the rates therein prescribed to such as are over a specified minimum, is reprehensible.⁷⁶ The Commission has had occasion to condemn a tariff such as to lead to confusion and discrimination in application of different rates to similar mixed carloads.⁷⁷ In the revision of the tariffs of the express companies, a simple method of stating express rates was required by the Commission.⁷⁸ And in general careless tariffs have been condemned again and again.⁷⁹

§ 845. Necessary fullness of statement.

The schedules should be sufficiently full to show all that a shipper needs to know. Thus published tariffs specifying rates per standard crate on vegetables shipped from Florida to northern or northeastern points should state plainly the dimensions of the crate to which the rates apply.⁸⁰ On the other hand, where the rate sheet states that the rates are subject to an official classification filed with the Commission, this was held enough to inform shippers that the rates given were for carriage with limited liability.⁸¹ The law requires that tariffs shall state plainly the rates applicable to any transportation which the railroads per-

⁷⁵ *H. B. Pitts & Son v. St. Louis & S. F. Ry.*, 10 Int. Com. Rep. 684.

⁷⁶ *Colorado Fuel & I. Co. v. Southern P. Co.*, 6 Int. Com. Rep. 488.

⁷⁷ *Barrett M'fg Co. v. C., M. & St. P. Ry.*, 20 I. C. C. R. 79.

⁷⁸ *In re Express Rates*, 24 I. C. C. 380.

⁷⁹ *Payne v. M. O. L. & T. R. R. v. S. C. Co.*, 15 I. C. C. 185.

⁸⁰ *Re Alleged Unlawful Charges for Transportation of Vegetables*, 8 Int. Com. Rep. 585.

⁸¹ *Mannheim Ins. Co. v. Erie & W. T. Co. (Minn.)*, 75 N. W. 602.

form. Published tariffs are of little value if a shipper cannot depend upon the statements therein contained.⁸² A rule in a circular that agents shall decline to receive shipments of freight "to order," with directions to notify parties elsewhere than at destination point should be filed with Commission.⁸³ A class-rate tariff containing no reference to the commodity rate tariff, it was held that this mere technical omission did not invalidate the commodity issue.⁸⁴

§ 846. Methods of stating rates.

The Commission has often said that tariffs must be so framed as to be intelligible to those who are not necessarily experts in reading them.⁸⁵ The practice is condemned of inserting obscure and general clauses in voluminous tariff publications, to the effect that where a combination of locals, either general or in specific instances, will make a lower aggregate through rate than the specific joint through rate therein stated, the former will be used.⁸⁶ It is a mischievous practice for carriers to publish to their tariffs and on their bills of lading rules and regulations which are misleading, unreasonable, or incapable of literal enforcement in a court of law.⁸⁷ Carriers should not publish rates in one tariff and discounts or allowances from such rates in another tariff, but instead, should file a new rate as such.⁸⁸ Various light and bulky articles which cannot be loaded heavily were given the lowest minimum contained in the particular carriers' tariffs; this practice was said to be known as "the principle of the least minimum," and to apply universally.⁸⁹ In the absence of a

⁸² *Crescent Coal & Mining Co. v. C. & E. I. R. R.*, 24 I. C. C. 149.

⁸³ *Ludowici-Celadon Co. v. A. C. L. R. R.*, 28 I. C. C. 693.

⁸⁴ *Highland Park M'fg Co. v. S. Ry.*, 26 I. C. C. 67.

⁸⁵ *Porter v. St. Louis & S. F. Ry.*, 15 I. C. C. 4.

⁸⁶ *Hydraulic Press Brick Co. v. St. Louis & S. F. Ry.*, 11 I. C. C. 342.

⁸⁷ *Re Released Rates*, 11 I. C. C. 550.

⁸⁸ *In re Allowances for the Transfer of Sugar*, 14 I. C. C. 619.

⁸⁹ *Lindsay Bros. v. P. M. R. R.*, 25 I. C. C. 368.

reconsignment privilege applicable to a given shipment it was held that the sum of the locals to and from the point of reshipping is the legal rate.⁹⁰

§ 847. Requirements of the Commission.

The Commission has full jurisdiction over regulations affecting transportation expressed in tariffs.⁹¹ Tariffs should not be used until Commission's rules are complied with.⁹² Note should be made of the Commission's rules concerning supplements to tariffs.⁹³ An index sufficient to comply with Commission's rules should be included.⁹⁴ All the rules come to this, that the classifications should be clearly stated. Tariffs which apply rates upon commodities according to their use are improper; the carrier has no right to attempt to dictate the uses to which commodities transported by it shall be put.⁹⁵ And for the same reason the practice of naming specific consignors and consignees as entitled to special service is condemned.⁹⁶ Short-term commodity rates are suggestive of the "mid-night tariff" of the older times before the requirement of a month's notice.⁹⁷ The ruling of the Commission directing that if a supplement to a tariff is issued which conflicts with a part of a previous supplement, which is not thereby canceled in full, that such newly issued supplement should specifically state the portion of the previous supplement intended thereby to be canceled, is held to apply to successive supplements to the same tariff, as well as to other and different tariffs.⁹⁸

⁹⁰ *Deeves Lumber Co. v. A. & V. Ry.*, 25 I. C. C. 42.

⁹¹ *Hood & Son v. Delaware & Hudson*, 17 I. C. C. 15.

⁹² *Noble v. G. T. W. Ry. Co.*, 20 I. C. C. 70.

⁹³ *In re Proposed Schedules of Rates on Lumber*, 20 I. C. C. 575.

⁹⁴ *Western Mantle Co. v. S. P. & S. Ry. Co.*, 20 I. C. C. 643.

⁹⁵ *Crescent Coal & Mining Co. v. C. & E. I. R. R.*, 11 I. C. C. 149.

⁹⁶ *Pierce Co. v. N. Y. C. & H. R. R. Co.*, 19 I. C. C. 579.

⁹⁷ *Du Pont de Nemours Powder Co. v. D. & N. R. R. Co.*, 20 I. C. C. R. 83.

⁹⁸ *Veitch v. S. A. L. Ry.*, 22 I. C. C. 4.

§ 848. Consequences of indefinite tariffs.

A tariff so ambiguous as to be impossible of determination is of no effect.⁹⁹ A complainant is not to be deprived of his right to a reasonable rate by the fact that the defendants, through neglect of the rules of this Commission as to publication of their tariffs, had failed to establish that rate in legal form.¹ Recently where a tariff provision relating to crating of articles was found to be ambiguous, reparation was awarded for unreasonable charges resulting therefrom.² But still more lately it has been held that reparation will not be awarded where claim is not based upon reasonableness of rate charged, but involved simply a question of tariff construction.³ A tariff stating that the rate is governed by what a State commission fixes is improper.⁴ In an indictment against a shipper under the Elkins Act for accepting and receiving a concession, it is error to exclude evidence offered on the part of defendant to show that it had no knowledge of the lawfully published rate, especially where the tariffs setting out such rate were involved and somewhat ambiguous.⁵ Minimums must be duly scheduled, else the carload is the car full at its actual weight.⁶ Damages were awarded for violation of section 6, where shipper routed his goods via a route taking a higher rate, because tariff was defective in failing to state that there were two stations in the same State by the same name.⁷

§ 849. All pertinent conditions requisite.

It is the duty of a carrier to set forth in connection with the published rate any exceptions thereto or references to

⁹⁹ See *Stone O. Co. v. P. B. & W. R. R.*, 18 I. C. C. 160.

¹ *Black Horse Tobacco Co. v. I. C. R. R.*, 17 I. C. C. 588.

² *Alexander v. S. P. Co.*, 24 I. C. C. 306.

³ *Taylor Dry Goods Co. v. M. P. Ry.*, 28 I. C. C. 205.

⁴ *United States v. Standard Oil Co.*, 170 Fed. 988.

⁵ *Standard Oil Co. of Indiana v. United States*, 164 Fed. 376.

⁶ *Sunderland Bros. v. Missouri R. & F. Ry.*, 18 I. C. C. 425.

⁷ *Larson Lumber Co. v. G. N. Ry.*, 21 I. C. C. 474.

any rules, regulations, or conditions affecting the application of the rate; and, if this is not done, the rate is absolute and unlimited as to all points within its purported application.⁸ Carriers should not publish rates in one tariff and rules and regulations affecting such rates in another tariff, or even in another passage of the same tariff.⁹ Although a rule may appear to be unlimited in its application when taken by itself, the general character of the tariff in which it is found must be taken into consideration.¹⁰ If all the parts constituting a completed article are offered as one shipment, under one bill of lading, the freight charge should be calculated upon a rating for the completed article.¹¹ A clause in a tariff providing that weight ascertained upon a particular scale should govern was held unreasonable by the Commission.¹² An initial carrier's tariff providing for a deduction in weight on account of moisture, a connecting carrier, which participated in the movement, having not concurred in such tariff, it was held that the complainant was entitled to the deduction only on that part of the haul performed by the initial carrier.¹³

§ 850. Rules for construing schedules.

Tariff rules must have a reasonable interpretation. And the Commission has been very insistent that tariffs should be definite.¹⁴ Tariffs are but forms of words, and the Commission in the exercise of its power to administer the Act, can look beyond the forms to what caused them and what they are intended to cause and do cause.¹⁵ Tariffs are to be construed according to what they express not

⁸ *Crescent C. & M. Co. v. C. & E. I. R. R.*, 24 I. C. C. 149.

⁹ See I. C. C. Conference Ruling, No. 281.

¹⁰ *Hutchinson Mill Co. v. A., T. & S. F. Ry.*, 25 I. C. C. 180.

¹¹ *Western Classification Case*, 25 I. C. C. 442.

¹² *In re Weighing of Freight by Carrier*, 28 I. C. C. 7.

¹³ *Hull v. So. Pac. Co.*, 24 I. C. C. 302.

¹⁴ *Western Classification Case*, 25 I. C. C. 442.

¹⁵ *In re Advances on Manganese Ore*, 25 I. C. C. 663.

according to what is thought to be their intent.¹⁶ In other words, tariffs are to be interpreted according to the reasonable construction of their language; the intention of the framers and the practice of the carriers do not control.¹⁷ A tariff rate or rule cannot be divorced from any of its governing conditions or limitations, except by clear and specific tariff provision therefor.¹⁸ It was held, therefore, that unless shipments were in fact soda ash and designated as it, they are not entitled to soda-ash rating.¹⁹ And for another example of this, a tariff was held ambiguous in not defining what was meant by "knocked down," "knocked down flat" and "completely knocked down."²⁰ The term "live stock" used in a tariff providing for the free transportation of caretaker does not include a caretaker of chickens.²¹ In another case this Southern classification was construed; and it was held that farm wagons were properly rated as sixth-class freight and did not come within the exception in favor of "agricultural implements," in which were included farm wagons and other articles taking a mixed carload rate.²² Commodity rates should be strictly applied; and a special rating on "pepper" does not take "chile pepper" out of classification.²³ While cannel coal may properly be given a higher rate than bituminous, in the absence of a cannel-coal rate, the bituminous rate would apply to cannel coal.²⁴

§ 851. Specific ratings overrule general.

In every instance where a commodity rate is named in a tariff upon a commodity and between specified points, the

¹⁶ *Newton Gum Co. v. C., B. & Co.*, 16 I. C. C. 341.

¹⁷ *Bon Marche v. C. R. R. Co. of N. J.*, 21 I. C. C. 195.

¹⁸ *Newman Lumber Co. v. M. C. R.*, 11 I. C. C. 97.

¹⁹ *Ponchatoula Farmers' Ass'n v. I. C. R. R.*, 19 I. C. C. 513.

²⁰ *Pacific Coast Biscuit Co. v. S. P. & S. Ry.*, 20 I. C. C. 546.

²¹ *Ream v. S. P. Co.*, 25 I. C. C. 107.

²² *Crombie & Co. v. S. P. Co.*, 19 I. C. C. R. 561.

²³ *Milburn Wagon Co. v. L. S. & M. S. Ry.*, 22 I. C. C. R. 460.

²⁴ *North Fork Cannel Coal Co. v. A. A. R. R.*, 25 I. C. C. 241.

commodity rate is the lawful rate, and the only rate that can be used with relation to that traffic between those points, even though a class rate or some combination may be lower.²⁵ The naming of a commodity rate on any article or character of traffic takes such articles or traffic entirely out of the classification and out of the class rates between the points to which such commodity rate applies.²⁶ Where both class and commodity rates on any article are in effect from and to the same points, the commodity rate, being specific, takes the article out of the classification and becomes the only lawful rate.²⁷ And, therefore, a rule providing that the publication of a commodity rate removes the application of the classification rate, was not found unreasonable.²⁸ Sometimes a tariff provides for an alternate application by which either class or commodity rate may be applied dependent upon which is the lower.²⁹ Where two rates are in effect, the shipper is justified in demanding the lower, and the carrier may not lawfully collect more.³⁰ Although naming of commodity rate takes article out of class rates, this rule does not prevent alternative use of class and commodity rates in same tariff.³¹ Where conflicting rules which affect the rate, are published effective on the same date in separate tariffs by the same carrier, the rule which will result in application of lower rate is taken.³² But it is generally so that where a commodity rate is named, such commodity rate is the only rate that may be used.³³ The so-called alternative rule provides that, if class rates make lower charge than commodity rates, class rates

²⁵ *Western Classification Case*, 25 I. C. C. 442.

²⁶ *Porter v. St. L. & S. F. R. R.*, 15 I. C. C. 1.

²⁷ *Central California Traction Co. v. C., M. & St. P. Ry.*, 24 I. C. C. 550.

²⁸ *In re Express Rates*, 24 I. C. C. 380.

²⁹ *Rates on Sash, Doors, and Blinds into Texas*, 26 I. C. C. 116.

³⁰ *Boise Commercial Club v. Adams Express Co.*, 17 I. C. C. 115.

³¹ *Wheeler & Motter Mercantile Co. v. C., B. & Q. R. R.*, 20 I. C. C. 141.

³² *Badenoch Co. v. C. & N. W. Ry.*, 22 I. C. C. 36.

³³ *Goerres Cooperage Co. v. C., M. & St. P. Ry.*, 21 I. C. C. 5.

should apply.³⁴ The fact that an article is specifically described in another part of the classification renders improper the application of a rate limited to such articles "not otherwise specified."³⁵ If it comes to a simple issue where there are two tariff rates on the same articles, the higher rate should not be charged.³⁶

³⁴ *Western Fruit Jobbers' Ass'n v. C., R. I. & P. Ry.*, 27 I. C. C. 417.

³⁵ *Auto Vehicle Co. v. C., M. & St. P. Ry.*, 21 I. C. C. 286.

³⁶ *Ohio Foundry Co. v. P., C., C. & St. L. Ry.*, 19 I. C. C. 65.

CHAPTER XVIII

INTERCHANGE OF TRAFFIC

- § 860. Provisions of the Act.
- 861. Duties as to connecting services.

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- § 862. Through service may be undertaken.
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§ 860. Provisions of the Act.

By section 15 as now revised compulsory joint carriage is provided for by this machinery: The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish through routes and joint classifications, and may establish joint rates as the maximum to be charged and may prescribe the division of such rates as hereinbefore provided and the terms and conditions under which such through routes shall be operated, whenever the carriers themselves shall have refused or neglected to establish voluntarily such through routes or joint classifications or joint rates; and this provision shall apply when one of the connecting carriers is a water line. The Commission shall not, however, establish any through route, classification, or rate between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business and railroads of a different character, nor shall the Commission have the right to establish any route, classification, rate, fare, or charge when the transportation is wholly by water. If the carriers cannot come to an agreement as to the divisions of the through rate, the Commission may then fix the divisions itself in a subsequent proceeding. But in establishing such through route, the Commission shall not require any company, without its

consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith which lies between the termini of such proposed through route, unless to do so would make such through route unreasonably long as compared with another practicable through route which could otherwise be established.

§ 861. Duties as to connecting services.

There can be no doubt at common law of the fundamental proposition that no carrier has any standing in law to demand, as a matter of right, that another carrier shall make any joint arrangements for through service. All that the law of the land requires of a carrier is that it shall perform for anyone the service it is offering to the public. The law does not compel a carrier to associate itself in performing service with another carrier but it does require a carrier to accept goods from another carrier for further transportation. In other words, a carrier is bound to do for goods coming through by a preceding carrier what it would be bound to do for goods if offered at its terminus by the shipper in person. The original Act provided simply for connecting carriage, but it did not go much further than the common law; section 3, which is still in force yet reads as follows: Every common carrier subject to the provisions of this Act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.

*Topic A. Basis of Through Service***§ 862. Through service may be undertaken.**

The rule is generally recognized that the obligation of a carrier to transport goods is limited to the route over which it professes service. But although a carrier, therefore, cannot be called upon to undertake the transportation of goods beyond its own route, it may voluntarily assume through transportation, relying upon its connections as agencies to fulfill its undertaking.⁸⁸ For while a railroad cannot be compelled to accept and to agree to carry goods to points beyond its own line, yet it may do so. And if the carrier expressly or impliedly contracts to carry from the consignor to the consignee it will be liable as a common carrier for the whole distance. Another example is the acceptance of a telegram by the initial company upon the basis that it will be responsible for its delivery at its destination, although that is a point upon the lines of another company.⁸⁹ These are but two instances, although by far the most prominent of the possibility that although a public service company may not be compelled to go outside its profession it may voluntarily undertake to do so.

§ 863. Presumptions as to through carriage.

In England and in some of the United States, the presumption is that when goods are taken marked for a point beyond the route of the initial carrier, through service is assumed. In the leading English case, *Muschamp v. Lancaster and Preston Junction Railway Company*⁹⁰ it was held that such acceptance of goods so marked in itself made out a *prima facie* case from which the jury were justified in finding the accepting carrier liable as such even for a loss occurring beyond its own line. By the weight of American authority, however, the natural pre-

⁸⁸ *Missouri, K. & T. Ry. v. McCann*, 174 U. S. 580, 43 L. ed. 1093, 19 Sup. Ct. 755.

⁸⁹ *Stevenson v. Montreal Telegraph Co.*, 16 Upp. Can. 2 B. 530.

⁹⁰ 8 M. & W. 421.

sumption prevails that each carrier is liable only for carriage over his own route unless he has committed himself clearly to through transportation. The mere fact that the original carrier has accepted goods marked for a point off his own route is not sufficient to overcome this presumption. In one of the leading American cases, *Nutting v. Connecticut River Railroad Co.*,⁹¹ it was said that in the absence of any special contract the obligation is nothing more than to transport the goods safely to the end of their road, and there deliver them to the proper carrier, to be forwarded towards their ultimate destination.

§ 864. Effect of the Carmack Amendment.

For interstate commerce the question has now become settled beyond further questioning by the so-called Carmack Amendment. This provides positively that any common carrier, receiving property for transportation from a point in one State to a point in another State shall issue a bill of lading therefor and shall be liable to the lawful holder thereof for any damage to such property caused by it or by any carrier over whose lines such property may pass. Furthermore, it is enacted that no contract shall exempt such carrier from the liability hereby imposed, thus making it simply a matter of academic interest as to whether a carrier may or may not at common law stipulate against liability where it is not to blame.⁹² However, the subrogation of the initial carrier, if it pays the loss, to recover from the carrier on whose line the loss happened, for the amount it has to pay to the owners, if duly established, is secured by the Amendment. And it also provides that no right of the owners to pursue such other remedies they may have shall be done away with. The courts have held, however, that any State doctrines in relation to the extent of liability in connecting carriage and the limitation of responsibility therein are thereby

⁹¹ 1 Gray, 502.

226 U. S. 491, 33 Sup. Ct. 148, and

⁹² *Adams Exp. Co. v. Crovinger*, cases cited.

automatically made altogether inapplicable to losses occurring in interstate transportation.⁹³

§ 865. What constitutes connecting service.

It would not seem that it would be a difficult question to determine whether a particular case really involves connecting service with its accompanying obligations; and yet certain decisions will show that this problem may be very difficult. Thus a transfer company employed by one carrier to transfer the goods to the next carrier,⁹⁴ or a cartage company employed by the last carrier to deliver the goods to the consignee,⁹⁵ or a stockyard to which a railroad delivers cattle,⁹⁶ or a telephone used to deliver a telegram,⁹⁷ or a hackman employed by a passenger at a railroad station,⁹⁸ or a teamster employed by the consignee to remove goods from the carrier's station,⁹⁹ are none of them connecting services. These are not all of the same class although they come to the same result. In the transfer, cartage, stockyards, and telegraph cases, there is no connecting service because the patron is dealing with but one service, which uses the others as a subordinate instrumentality to perform its service. In the hackman and teamster cases the patron employs the additional service upon a separate basis altogether.

§ 866. Obligation of initial carrier to take to connection.

In connecting carriage each party involved is not really asked to do more than his full duty within the limits of his own profession, except that the special circumstances may seem to call for unusual action to some extent. Of

⁹³ See *Boston & M. R. R. v. Hooker*, 233 U. S. 97, 34 Sup. Ct. 526, and cases cited.

⁹⁴ *Hooper v. Chicago & N. W. R. R.*, 27 Wis. 81, 9 Am. Rep. 439.

⁹⁵ *St. Louis Drayage Co. v. Louisville & N. R. R.*, 65 Fed. 39.

⁹⁶ *Central Stockyards Co. v. Louis-*

ville & N. Ry., 192 U. S. 568, 24 Sup. Ct. 339, 48 L. ed. 565.

⁹⁷ *People v. Western Union Telegraph Co.*, 166 Ill. 15, 46 N. E. 731, 36 L. R. A. 637.

⁹⁸ *Brown v. New York C. & H. R. R.*, 151 N. Y. 674, 46 N. E. 1145.

⁹⁹ *Parmelee v. Lowitz*, 74 Ill. 116, 24 Am. Rep. 276.

the duty of the initial carrier to undertake service to the point of connection on its line with the succeeding carrier there can be no doubt.¹ This elementary point has been most litigated in recent times in regard to telegraph companies, the initial company sometimes disliking to accept a message to a connecting point, there to be delivered to another company, very often a competitor; but it is well established that each must receive and forward with diligence to the connecting line, and each will be held liable for its failure or refusal to perform that duty.² In case of carriage there are usually marks on the package designating its course; moreover, its bills accompany it; in case of the telegraphing, however, it is a reasonable requirement by the first company that words designating the connection desired shall be sent with the message.³ This duty resting upon the initial party to act is positive; it is no excuse that the initial carrier believes that the succeeding carrier will refuse to accept the goods.⁴

§ 867. Obligation of second carrier to accept.

Of the duty in each succeeding service to receive what is properly tendered to it by its predecessor in service there can also be no doubt. It is established law, made necessary from the character of the business, that it is the duty of common carriers to accept freight tendered by another common carrier, and that a consignor of goods to be carried over successive routes makes the first and each successive carrier his forwarding agent. Each carrier who takes charge of the goods becomes an agent of the consignor to tender the goods.⁵ And a telegraph company

¹ *Seasongood v. Tennessee & O. N. W. Ry. Co.*, 150 N. C. 608, 64 R. Transp. Co., 21 Ky. Law Rep. S. E. 588.
1142, 54 S. W. 193.

² See *Western Union Telegraph Co. v. Simmons* (Tex. Civ. App.), 93 S. W. 686. ⁴ *Telephone Co. v. Brown*, 104 Tenn. 56, 55 S. W. 155, 50 L. R. A. 277, 78 Am. St. Rep. 906.

³ *United States v. Northern Pac. Ry. Co.*, 120 Fed. Rep. 546; *Wampum Cotton Mills v. Carolina & Andrus v. Columbia & O. Steamboat Co.*, 47 Wash. 333, 92 Pac. 128, 130.

chosen as the connection is in default when it refuses to accept a message tendered by the initial company.⁶ It follows that the connecting company can make no unreasonable requirement which would seriously interfere with the course of through service. A connecting railroad cannot require as to freight tendered by a connection that the shippers must themselves appear at the point of connection, and rebill their goods.⁷ Nor can a telegraph company make the vexatious requirement that it will not recognize the tendering company as the agent of the sender unless he files a written power of attorney.⁸

§ 868. Obligations as to routing.

The Act now provides that not only may shippers route their own goods when connecting carriage is in question, but where there is a choice of through routes the shipper may not be prevented from taking which he chooses; and jurisdiction exists in the Commission to award damages resulting from misrouting.⁹ It has often been held that reparation may be awarded for failing to route via the lower combination.¹⁰ Section 15 of the Act now establishes duty of carrier to forward according to instructions in bill of lading.¹¹ The shippers' right to choose, thus given, cannot be overbalanced by so-called "natural routes."¹² A shipper may insist on a railroad short hauling itself.¹³ But if goods are left to a carrier it is under no duty to turn over to competitors with a lower rate.¹⁴ Where instructions call for delivery by a certain road, the shipment, it seems, should be delivered to such

⁶ *Conyers v. Postal Telegraph Cable Co.*, 92 Ga. 619, 19 S. E. 253, 44 Am. St. Rep. 100.

⁷ *Dunham v. Boston & Maine R. Co.*, 70 Me. 164, 35 Am. Rep. 314.

⁸ *Atlantic & Pac. Tel. Co. v. Western Union Telegraph Co.*, 4 Daly (N. Y.), 527.

⁹ *Noble v. J. L. C. & E. R. R.*, 20 I. C. C. 520.

¹⁰ *C. H. Algert Co. v. D. & R. G. R. R.*, 20 I. C. C. 93.

¹¹ *Weyl-Zuckerman & Co. v. C. M. Ry.*, 27 I. C. C. 493.

¹² *Refuge Cotton Oil Co. v. St. L., I. M. & S. Ry.*, 27 I. C. C. 117.

¹³ *Ch. of C. of Milwaukee v. Chicago, R. I. & P. Ry.*, 15 I. C. C. 460.

¹⁴ *Paragould Lumber Co. v. M. P.*, Unrep. 485.

road at a junction over which the lowest rate is applicable.¹⁵ And where there are no instructions the carrier must choose the cheapest connections.¹⁶ Where the rate is the same the carrier may route as it pleases, in absence of instructions.¹⁷ The mistake of the shipper as to what rate is applicable to his shipment, is no basis for reparation.¹⁸ Instructions "all rail" govern, even if "rail and water" are cheaper.¹⁹ Where a rate does not apply via the route named, the carrier should ascertain from the shipper whether the rate or the route is to be followed.²⁰ The fact that shipper gave routing instructions over route taking higher rate, does not relieve carrier of liability, if that rate is unreasonable.²¹ Where instructions were to use the most direct route with a through rate, and no rate was applicable from origin to destination, a shipment was forwarded via a circuitous route; but reparation was awarded on the basis of a subsequently established rate via more direct route.²²

§ 869. Fixing the blame for misrouting.

Both initial and connecting lines may be liable in damages for misrouting; the carrier at fault is liable for forwarding cars by more expensive route contrary to or in absence of instructions.²³ A carrier is liable in damages where a shipper is injured as a result of a carrier's failure to route by the cheapest available route in the absence of routing instructions.²⁴ Where a consignor specified a route in bill of lading, and also designated a rate therein not applicable to the route named, it was held that the

¹⁵ Ryland & Brooks Lumber Co. v. G. & O. Ry., 21 I. C. C. 520.

¹⁶ Marshall & M. G. Co. v. St. Louis & S. F. R. R., 16 I. C. C. 385.

¹⁷ Shipper P. Ass'n v. Atlantic C. L. R. R., 14 I. C. C. 476.

¹⁸ Running v. C., St. P. M. & O. Ry., 19 I. C. C. 565.

¹⁹ Hollingshead & B. v. P. & L. E., 13 I. C. C. 193.

²⁰ Gibson Fruit Co. v. C. & N. W. Ry., 21 I. C. C. 644.

²¹ Shoupe & Co. v. T. & B. V. Ry., 26 I. C. C. 570.

²² Samuels & Co. v. St. L. S. W. Ry., 20 I. C. C. 151.

²³ Beekman Lumber Co. v. L. Ry. & N. Co., 19 I. C. C. R. 343.

²⁴ Poor Grain Co. v. C., B. & Q. Ry. Co., 12 I. C. C. 418.

initial carrier, having failed to obtain further and definite instructions before forwarding, is liable for damages resulting from misrouting.²⁵ The initial carrier will be held liable for misrouting upon a shipment forwarded via a route taking a combination rate higher than that applicable through another recognized gateway.²⁶ Delivering lines owe to shippers under joint rates the obligation to do what they reasonably can to avoid delays in the delivery of their traffic.²⁷ But no obligation rests upon carrier to hunt up unnatural connections or practically unknown gateways in order to determine lowest possible combination.²⁸ It is not unreasonable to require of the carrier to ascertain before receiving export cotton for transportation to Galveston whether it can be cared for at Galveston upon its receipt.²⁹ A carrier which without authority diverted traffic from the route specified in the bill of lading is liable for increased charges resulting from such unauthorized diversion.³⁰ A carrier is liable in damages who fails to route shipments via cheapest available route, and thereby deprives complainant of reconsigning privileges.³¹ Where a consignor specified a route in bill of lading, and also designated a rate therein not applicable to the route named, it was held that the initial carrier, having failed to obtain further and definite instructions before forwarding, is liable for damages resulting from misrouting.³²

§ 870. Carriers not compelled to bill through.

Under the original Act no power was given to the Commission to compel through billing, routing or rating by connecting lines. This can be done only by contract or arrangement between the carriers, and the Act did not

²⁵ *Whaley-Warren Lumber Co. v. C. C. & O. Ry.*, 21 I. C. C. R. 530.

²⁶ *Goodman M'fg Co. v. P. R. R. Co.*, 26 I. C. C. 423.

²⁷ *Detroit Reconsigning Case*, 25 I. C. C. 392.

²⁸ *Hettler Lumber Co. v. G. & S. I. R. R. Co.*, 20 I. C. C. R. 14.

²⁹ *Galveston Commercial Ass'n v. A., T. & F. Ry. Co.*, 25 I. C. C. 216.

³⁰ *Weyl Zuckerman & Co. v. C. M. Ry.*, 27 I. C. C. 493.

³¹ *Newman Lumber Co. v. M. C. R. R.*, 26 I. C. C. 97.

³² *Ludowici-Celadon Co. v. M. P. Ry.*, 22 I. C. C. 588.

compel connecting carriers to make mutual contracts.³³ With nothing more than section 3 in the Act in the earlier days, there were sweeping decisions in the courts, holding that an interstate carrier did not violate that section by exacting the prepayment of freight on all property received from it at a given station from one connection, although it did not require its charges to be paid in advance on freight received from a competing carrier at such station. The courts went so far as to say that an interstate carrier which enters into an arrangement with a connecting carrier for through billing, rating, and loading, and for the use of its tracks and terminals, is not obliged to make the same arrangement with other connecting carriers, though the physical facilities for an interchange of traffic are the same.³⁴ It should be noted that these decisions are still good law when the issue is whether the carrier by refusing to act in conjunction with another carrier has discriminated in such a way as to violate these provisions of the Act.

§ 871. Discrimination forbidden where public duty involved.

Where there are two rival lines of steamboats on a river

³³ *Central Stockyards Co. v. Louisville & N. R. R.*, 192 U. S. 568, 48 L. ed. 565, 24 Sup. Ct. 339; *Kentucky & I. Bridge Co. v. Louisville & N. R. R.*, 2 L. R. A. 289, 2 Int. Com. Rep. 351, 37 Fed. 567, 629; *Little Rock & M. R. R. Co. v. St. Louis, I. M. & S. Ry.*, 2 Int. Com. Rep. 763, 41 Fed. 559; *Chicago & N. W. Ry. v. Osborne*, 3 C. C. A. 347, 4 Int. Com. Rep. 257, 52 Fed. 915; *Oregon Short Line & U. N. Ry. v. Northern P. R. R.*, 4 Int. Com. Rep. 718, 9 C. C. A. 409, 15 U. S. App. 479, 61 Fed. 158, affirming 4 Int. Com. Rep. 249, 51 Fed. 465; *Little Rock & M. R. Co. v. St. Louis S. W. R. Co.*, 26 L. R. A. 192, 4 Int. Com. Rep. 854, 11 C. C. A. 417,

27 U. S. App. 280, 63 Fed. 775; *St. Louis Drayage Co. v. Louisville & N. R. Co.*, 5 Int. Com. Rep. 137, 65 Fed. 39; *Allen v. Oregon R. & Nav. Co.*, 98 Fed. 16.

³⁴ *Mattingly v. Pennsylvania Co.*, 2 Int. Com. Rep. 806, 3 I. C. C. 592; *Re Clark*, 2 Int. Com. Rep. 797, 3 I. C. C. 649; *Re Joint Water & Rail Lines*, 2 Int. Com. Rep. 486, 2 I. C. C. 645; *Capehart v. Louisville & N. R. R.*, 3 Int. Com. Rep. 278, 4 I. C. C. 265; *Commercial Club v. Chicago, R. I. & P. Ry.*, 6 I. C. C. Rep. 647; *New York, N. H. & H. R. R. v. Platt*, 7 I. C. C. Rep. 323; *Savannah Bureau of Freight & Transp. v. Louisville & N. R. R.*, 8 I. C. C. Rep. 377.

plying between the same points, and carrying freight for hire, both bearing the same relation to a railroad company and both seeking its services to forward their freight to the same points of destination, and the company systematically discriminates against one by charging on goods coming to or from it fifty cents a hundred more for freight than in the case of the other, a suit for such discrimination can be brought.³⁵ And where a tariff of a railroad company fixes a rate on shipments originating on its own line, or on certain enumerated connecting lines, it assumes the obligation to carry at that rate for shippers whose shipments originate on other lines as well; and, if such shipper is required to pay for such services at a higher rate than that named in the tariff, he is entitled to recover the amount of the overcharge.³⁶ And in general it may be said that no policies can be adopted inconsistent with public duty whereby prejudice is done to connecting business. An arrangement by which a stage line refused to take through on the same day passengers coming by a rival line was held illegal long ago in a leading case.³⁷ And more recently a contract by a steamboat owner not to receive goods consigned to points beyond its line was held illegal.³⁸

Topic B. Requisites as to Through Rates

§ 872. Joint rates must be reasonable.

The shipper or consignee has no direct interest in the way a joint rate is divided between the carriers, nor in the amount of the division received by each carrier. The entire through rate is what interests the public, and in so far as a carrier gives up a part of its fair division for the sake of obtaining business the public is not concerned.³⁹ It is clear, of course, that the entire rate must not be so low

³⁵ *Samuels v. L. & N. Ry.*, 31 Fed. 57.

³⁶ *Missouri, K. & T. Ry. v. New Era Milling Co.*, 100 Pac. 273.

³⁷ *Bennet v. Dutton*, 10 N. H. 481.

³⁸ *Seasongood v. Tenn. & O. Transp. Co.*, 24 Ry. L. Rep. 1142, 54 S. W. 193.

³⁹ *Re Proposed Advances in Freight Rates*, 9 I. C. C. Rep. 382, 433.

as to be unremunerative, and thus burden the local traffic.⁴⁰ As the rates for long distances cannot be exactly compared with those for short distances, the proportion received by one carrier out of a long distance through rate is not necessarily the measure of its share of a joint rate over a materially shorter distance; though it may be considered in determining the rightful relation of the two rates.⁴¹ When a joint rate is unreasonable the liability of defendants is joint and several, and Commission may award reparation against one, though other roads which performed part of service are not parties.⁴² When a through route has been established by agreement of the carriers, every shipper must be allowed the benefit of it.⁴³ The obligation to establish through routes and joint rates is imposed by section 1 as it now reads.⁴⁴

§ 873. Limitations upon joint rates.

It is entirely proper that two carriers should combine to form a single route and name a single rate for that haul. This will usually result in a lower rate than the sum of the two individual rates by reason of the relative economy of the long haul. For plainly a railroad may charge more for transporting its local passenger between two termini than it receives for transporting a through passenger over the same distance in the division of the through rate with other railroads.⁴⁵ When such a through rate has been established by the agreement of the carriers, every shipper is entitled to it; if some shippers are given an advantage

⁴⁰ *Lippman v. Illinois Cent. R. R.*, 2 Int. Com. Rep. 414, 2 I. C. C. Rep. 584.

⁴¹ *Colorado F. & I. Co. v. Southern Pac. Co.*, 6 I. C. C. Rep. 488.

⁴² *Webster Grocer Co. v. C. & N. W. Ry.*, 21 I. C. C. 20.

⁴³ *Rea v. Mobile & O. Ry.*, 7 I. C. C. Rep. 43.

⁴⁴ *Florida Cotton Oil Co. v. C. of G. Ry.*, 19 I. C. C. 336.

⁴⁵ *Union Pacific Ry. Co. v. United States*, 117 U. S. 355, 6 Sup. Ct. 772, 29 L. ed. 920; *Texas & P. Ry. Co. v. Interstate Com. Comm.*, 162 U. S. 197, 16 Sup. Ct. 666, 40 L. ed. 940; *Parsons v. Chicago & N. W. Ry. Co.*, 167 U. S. 447, 17 Sup. Ct. 887, 42 L. ed. 231; *Tosser v. United States*, 52 Fed. 917.

over others in such shipment it will be a case of illegal discrimination.⁴⁶ It should be noted throughout this discussion that under section 1 the carriers must make reasonable rates applicable to through routes.⁴⁷ And the Commission is expressly empowered to determine the reasonableness of any part of the aggregate of charges for interstate transportation and to establish joint rates.⁴⁸ The carriers establishing it must be prepared to furnish suitable instrumentalities of shipment and carriage; if any mistake is made by the first carrier in forwarding over the route that carrier is responsible.⁴⁹

§ 874. Nature of a joint rate.

A joint rate is a unit even though divided between several carriers arranging themselves into through route.⁵⁰ Where a joint through route has been formed, the rate charged is a through rate, and a shipment will move upon the rate existing at the time it is billed by the initial carrier; the adoption of a joint through rate will not affect a shipment moving upon a combination through rate.⁵¹ It follows that where between the same points via the same route, there are two rates—one a joint rate and the other a combination rate—the joint rate is the legal one.⁵² The Commission has never held that a through rate which is equal to the sum of the intermediate local rates is in itself sufficient to call for a reduction.⁵³ But very often a joint through rate will be held unreasonable to the extent that it exceeds the combination of local rates.⁵⁴ The test of reasonableness is applied, not to the separate factors,

⁴⁶ *Blair v. Sioux City & P. Ry. Co.*, 109 Ia. 369, 80 N. W. 673; *Bras v. McConnell*, 114 Ia. 401, 87 N. W. 290.

⁴⁷ *Flour City S. S. Co. v. L. V. R. R.*, 24 I. C. C. 179.

⁴⁸ *Sunderland Bros. Co. v. St. L. & S. F. R. R. Co.*, 23 I. C. C. 259.

⁴⁹ *Pond-Decker Lumber Co. v. Spencer*, 86 Fed. 846.

⁵⁰ *Re Through Rates & Through Rates*, 12 I. C. C. 163.

⁵¹ *Re Through Rates & Through Rates*, 12 I. C. C. 163.

⁵² *Arabol M'fg Co. v. S. B. Ry.*, 25 I. C. C. 429.

⁵³ *Appalachia Lumber Co. v. L. & N. R. R.*, 25 I. C. C. 193.

⁵⁴ *Kessler & Co. v. L. & N. R. R.*, 25 I. C. C. 397.

but to the rate as a whole.⁵⁵ Where an unreasonable joint through rate has been collected, and the only question involved is damages upon past shipments, the liability of the parties to such rate is joint and several.⁵⁶ And indeed a through rate for transportation over a line composed of two or more separate roads greater than would be reasonable and sufficient if the same transportation were over a single road is not in all cases unjust.⁵⁷ For the Commission has often recognized that rates over a two-line haul may properly exceed what would be reasonable rates for same distance and under same conditions over a one-line haul.⁵⁸ As between two joint tariffs, naming different rates between the same points, the one properly concurred in is the legal rate, though it names higher charges than the other.⁵⁹ As a matter of rate structure a through rate is often made by adding rate to basing point, with an "arbitrary."⁶⁰

§ 875. Joint rate lower than combination.

It is permissible for two carriers to combine upon a joint through rate over both lines, which shall be less than the sum of their separate rates.⁶¹ In other words, it is entirely proper that two carriers should combine to form a single route, join in one haul, and name a single rate for the haul. It is not only permissible, but extremely desirable, that this should be done; and the lower through rate thereby secured is quite justifiable. The through rate is almost universally less in proportion to distance than the local rate; the carriers can afford to make it lower; if they were compelled to measure the one by the other, there would be no inducement to form through

⁵⁵ People's Fuel Supply Co. v. Grand Trunk W. Ry., 27 I. C. C. 24.

⁵⁶ Webster Grocer Co. v. C. & N. W. Ry., 21 I. C. C. R. 20.

⁵⁷ Loup Creek Colliery Co. v. Virginian Ry., 12 I. C. C. 471.

⁵⁸ Maricopa County Commercial Club v. S. P. Co., 22 I. C. C. R. 429.

⁵⁹ Kennedy & Co. v. St. L. S. W. Ry., 22 I. C. C. R. 277.

⁶⁰ Aransas Pass Channel & Dock Co. v. G. H. & S. A. Ry., 27 I. C. C. 403.

⁶¹ St. Louis Hay & Grain Co. v. Illinois Cent. R. R., 11 C. C. Rep. 486.

lines, and shippers would be annoyed by having to deal with a succession of local roads instead of with one road acting for all. But if the through rate is less in proportion than the local, some of the carriers, if not all of them, must accept for their division of the through rate a sum less than the local rate. This is very manifest. It is well known, also, that many influences, such as competition on the through haul, affect the making of a through rate that may not bear at all, or if at all in less degree, upon the local rates.⁶²

§ 876. Concurrence of carriers concerned.

In order to be considered as properly in force, through routes and joint rates must be voluntarily established.⁶³ It would be improper for one road to establish a joint rate from a point on another road without the concurrence of the latter.⁶⁴ A joint rate over several lines not concurred in by such connecting lines is in direct contravention of the rules of the Commission made under section 6.⁶⁵ Where no joint through rate is thus in effect, the combination of separately established rates via route of movement constitutes the through rate.⁶⁶ An initial line publishing what purports to be a joint tariff, but which is not a legal tariff because not concurred in by its connections, is liable in damages for whatever amount shippers suffer.⁶⁷ For an initial line, publishing joint rates lower than combination without securing concurrence of connections, must protect such rate to a shipper who made a contract based on the lower rate.⁶⁸ While the fact that a through route extends over two railroads may lead to a lower rate than

⁶² *Lippman v. Illinois Cent. R. R.*,
2 Int. Com. Rep. 414, 2 I. C. C. 384.

⁶³ *Craig Lumber Co. v. V. Ry.*,
19 I. C. C. R. 114.

⁶⁴ *Coal Rates on the Stony Fork
Branch*, 26 I. C. C. 168.

⁶⁵ *De Camp Bros. & Yule Iron,
Coal & Coke Co. v. V. & S. F. Ry.*,
22 I. C. C. 274.

⁶⁶ *Fish & Co. v. N. Y. C. & St. L.
R. R.*, 19 I. C. C. R. 452.

⁶⁷ *Edison Portland Cement Co. v.
D., L. & W. R. R.*, 23 I. C. C. R.
382.

⁶⁸ *De Camp Bros. & Yule Iron
Coal & Coke Co. v. V. & S. W. Ry.*,
22 I. C. C. R. 274.

if it were over a single line, it may justifiably have the opposite effect; the rate may be justifiably lower between two termini when the route is over a single road than when it is over two roads.⁶⁹ Though not increased because of the joint carriage, the rate may well be maintained at the sum of the local charges of the carriers; and no objection can be raised to such a rate. No one has a right to demand that the through rate be a reduced rate.⁷⁰

§ 877. Share of separate carrier as evidence.

Although in the case of a joint rate it is the entire rate, and not the proportionate part which each carrier receives on the division, which directly interests the shipper, yet that division is not without significance in determining what are reasonable rates for the whole distance on the lines in question; and he is entitled to inquire into such division when he complains that the joint rate is unlawful, for the amount so received by the different carriers may throw light upon the reasonableness or justice of the aggregate charge.⁷¹ But plainly a railroad may charge more for transporting a local passenger between the two termini than it receives from transporting a through passenger over the same distance, in the division of the through rate with other railroads.⁷² While a division of a through rate long accepted by a carrier may often be pertinent evidence, it is not a sound final test of the reasonableness of the through rate itself. Nor is the rate per ton-mile the generally accepted basis in this country for making up interstate rates.⁷³ A carrier may deem it good

⁶⁹ *Corporation of Birmingham v. Manchester S. & L. Ry.*, 10 Ry. & Can. Tr. Cas. 62.

⁷⁰ *King v. New York, N. H. & H. R. R.*, 3 Int. Com. Rep. 272, 4 I. C. C. 251.

⁷¹ *Parkhurst v. Pennsylvania R. Co.*, 2 I. C. C. Rep. 131, 2 Int. Com. Rep. 78; *Railroad Commission v. Savannah, F. & W. R.*, 5 I. C. C.

Rep. 13, 3 Int. Com. Rep. 688; *Trammell v. Clyde S. S. Co.*, 5 I. C. C. Rep. 324, 4 Int. Com. Rep. 120; *Warren-Ehret Co. v. Central R. R.*, 8 I. C. C. Rep. 598.

⁷² *Union Pacific Ry. v. United States*, 117 U. S. 355, 29 L. ed. 920, 6 Sup. Ct. 772.

⁷³ *Bulte Milling Co. v. C. A. R. R.*, 15 I. C. C. 351.

business policy to secure a part of a through haul on a large volume of traffic, and to accept a division which is much lower than local rates, and if no violations of law are created, no valid objection can be made against such division.⁷⁴

§ 878. Through rate given although transit is broken.

A very important feature in modern railroading is the permission given to the owners of goods in transit to have the advantages of the through rate upon paying a very small additional premium, although the transit is interrupted for a time to do something to the commodities in question at some intermediate point, to prepare them for market, or even to entirely change their form by manufacture of some sort.⁷⁵ Thus the railroads not uncommonly grant the privilege of cleaning in transit, of bagging in transit, of compressing in transit, and of milling in transit.⁷⁶ Shippers are not entitled as a matter of right to mill grain in transit and forward the milled product under the through rate in force on the grain from the point of origin to the place of ultimate destination.⁷⁷ But the allowance of the privilege by a carrier to shippers in one section must be without wrongful prejudice to the rights of shippers in another section served by its line.⁷⁸

§ 879. Policing of transit privileges.

The most thorough discussion of this problem of privileges in transit is in an early opinion of the Commission,⁷⁹

⁷⁴ *New Albany Furniture Co. v. M. J. & K. C. R. R.*, 13 I. C. C. 594.

⁷⁵ *Koch v. Pennsylvania Ry.*, 10 I. C. C. Rep. 675.

⁷⁶ For the service of the carrier in handling reconsignments where transit is broken, the total cost may be higher than the through rate where the transportation is not interrupted. *St. Louis H. & G. Co. v. I. C. R. R.*, 11 I. C. C. 486.

⁷⁷ *Diamond Mills v. B. & M. R. R.*, 9 I. C. C. Rep. 311.

⁷⁸ A fair price may be charged by the carrier for transit privileges, sufficient not merely to recoup its bare cost but a fair profit as well. *Spregle v. S. Ry.*, 25 I. C. C. 71.

⁷⁹ *Re Alleged Unlawful Rates for Cotton*, 9 I. C. C. Rep. 121.

in regard to the practice of "floating cotton," the essential transportation feature of which was carrying the cotton to a compress, receiving it again in the compressed state, and transporting it to destination at the through rate in force from the point of origin.⁸⁰ It was held that the carrier may, as part of a contract for through shipment, allow the cotton to be stopped off for the purpose of grading and compression; but the privilege enters into and becomes part of the service covered by the rate, and should be specified in the published tariffs.⁸¹ The Commission said in substance that this cotton is in no possible construction at the compress point for any other purpose than a temporary one in transit; and that although an indispensable element in every through shipment would seem to be a contract for such through service, an agreement between the parties at the inception of the carriage that the freight was to go to some destination beyond to be designated later was enough.⁸²

§ 880. Proportional rates.

A proportional rate is a part or remainder of a through rate, and as such must be taken in its relation to the whole rate.⁸³ Recently the Commission has held the withdrawal of proportional rates from upper Mississippi River crossings while leaving them in effect from lower crossing not to be justified.⁸⁴ To a certain extent the Commission recognizes the propriety of proportional rates, which differ from corresponding local rates, and has acted upon those rates when established by the carrier.⁸⁵ It has said that a proportional rate, applying on through traffic might well be less than

⁸⁰ See *Re Rates & Practices of Mobile & O. R. R.*, 9 I. C. C. 373.

⁸¹ See the general discussion of all these matters in the *Transit Case*, 25 I. C. C. 130.

⁸² The same matters were discussed in the *Transit Case*, 26 I. C. C. 204.

⁸³ *Boney & Harper Milling Co. v. A. C. L. R. R.*, 28 I. C. C. 383.

⁸⁴ *Grain Rates in C. F. A. Territory*, 28 I. C. C. 549.

⁸⁵ *Southwestern Shippers Traffic Ass'n v. A., T. & S. F. Ry.*, 24 I. C. C. 570.

the corresponding local rate, but it has not said that such proportional rate must be, or in every case should be, less.⁸⁶ On through traffic to a given interior point, the proportional rate from the river crossing is usually higher than local rate from the river to that point.⁸⁷ Proportional rate applying to through traffic may well be lower than the corresponding local rate.⁸⁸ There is no substantial difference between a "reshipping" rate and what is known as a "proportional" rate.⁸⁹ The Commission is insistent that proportionals must be open to all under the same conditions. And proportionals should apply through all breaking points similarly situated.⁹⁰ Low proportionals do not justify unreasonable locals;⁹¹ there is no recognized relation between proportionals and corresponding locals. It all depends upon the traffic conditions through the territory;⁹² but proportional rate should not be limited to traffic from particular places.⁹³

§ 881. Export rates.

Export rates should be applied only to actual through movement, not to the case where the shipper takes possession and rebills.⁹⁴ Export or import rates must be open to all to combine with the rates of all ocean carriers.⁹⁵ There is no discrimination, because defendant maintains a low inland proportional rate on imported sugar.⁹⁶ In one proceeding a lower rate upon export grain during period of navigation was suggested but not re-

⁸⁶ Interior Iowa Cities, 28 I. C. C. 64.

⁸⁷ Star Grain & Lumber Co. v. A., T. & S. F. Ry., 14 I. C. C. 364.

⁸⁸ Baltimore Chamber of Commerce v. B. & O. R. R., 22 I. C. C. R. 596.

⁸⁹ Bascom Co. v. Atchison, T. & S. F. Ry., 17 I. C. C. 354.

⁹⁰ Henderson Elevator Co. v. Illinois Central R. R., 17 I. C. C. 573.

⁹¹ Board of Trade of Winston-

Salem v. Norfolk & W., 16 I. C. C. 12.

⁹² Indianapolis Freight Bureau v. C., C., C. & St. L. Ry., 15 I. C. C. 504.

⁹³ Bayou City Rice Mills v. T. & W. O. R. R., 18 I. C. C. 490.

⁹⁴ Re Transportation of Wools, 23 I. C. C. 151.

⁹⁵ Allman v. Adams Express Co., 14 I. C. C. 340.

⁹⁶ In re Rates, etc., of the Louisiana Ry. & Nav. Co., 22 I. C. C. R. 558.

quired, the present rate being apparently low.⁹⁷ An inland proportional higher than an export rate will generally be condemned.⁹⁸ It is unlawful to make differing export rates, depending upon differing destinations.⁹⁹ Carriers should quote open port proportional; then they may make through rates for foreign carriage on such basis as they please without coming within Act.¹ It is improper to exact more for export traffic than for domestic consumption.² Thus where cereal goes to ship as grain it pays grain export rate, if as flour it pays flour.³

Topic C. Facilities for Interchange of Business

§ 882. Physical connections at common law.

Those who have provided certain facilities in order to serve were at common law under no obligation to go beyond the service they have professed and substantially extend their existing facilities so as to make physical connection with another service.⁴ To require this under the Act as it originally provided was thought to be outside the theory of the restriction of obligation to the profession made. In a leading Federal case⁵ in refusing to order a railroad company to make connections with a switching company, the court said: "Neither this nor any other provision of law requires of the common carrier of interstate commerce the duty of either forming new connections or of establishing new stations for the reception and delivery of freight."⁶ The Act to Regulate Commerce deals with

⁹⁷ Board of Trade of Chicago v. v. Baltimore & O. R. R., 14 I. C. C. A. C. R. R., 20 I. C. C. 504. 356.

⁹⁸ St. Regis Paper Co. v. N. Y. C. & H. R. R. R., Unrep. op. ⁴ Kentucky & I. Bridge Co. v. Louisville & N. Ry. Co., 37 Fed. 567, 2 L. R. A. 289.

⁹⁹ New Orleans Board of Trade v. I. C. R. R., 23 I. C. C. 465. ⁵ See particularly Wisconsin, M. & P. R. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. 115.

¹ Cosmopolitan Shipping Co. v. Hamburg-American Packet Co., 13 I. C. C. 266. ⁶ International & G. N. Ry. Co. v. Railroad Commission of Texas, 99 Tex. 332, 89 S. W. 961.

² Newark Machine Co. v. P. C. C. & St. L., 16 I. C. C. 29.

³ Hecker-Jones-Jewell Milling Co.

such common carriers as it finds them, and leaves to them full discretion as to what extensions they will make of their lines, the connections they may form, and the yards and depots they may choose to establish." ⁷

§ 883. Discrimination between connecting lines.

Though not expressly contained in this clause of the Act it is nevertheless to be understood that discrimination is not forbidden unless it is undue or unreasonable. Thus in making contracts for through transportation of passengers, the initial carrier may lawfully prefer a road going through to the point of destination to one going only part of the way, an arrangement with which would necessitate further arrangements to reach the desired point.⁸ A combination of independent carriers by which one is to prefer the other to another connecting line outside of the combination does not justify discrimination between the connecting lines.⁹ But a railroad company operating steamers in connection with its railroad as a single line was not held guilty of a discrimination against another carrier, within the prohibition of this section of the Act, by refusing to allow a rival steamboat company to land its boats at a wharf used by it solely for connecting its railroad and boats, where there is no regular public station at such wharf, but the general station is at a little distance and ample facilities there exist.¹⁰ The Act contemplates independent carriers, capable of mutual relations; there must, therefore, be at least two other carriers besides the offending one. Both companies must be independent of the railroad charged with discrimination, and both must

⁷ Rutland R. R. Co. v. Bellows Falls & S. R. St. Ry. Co., 73 Vt. 20, 50 Atl. 636.

⁸ Little Rock & M. R. R. v. East Tennessee, V. & G. R. R., 47 Fed. 771, 4 Int. Com. Rep. 261.

⁹ New York & N. Ry. v. New York

& N. E. R. R., 50 Fed. 867, 4 Int. Com. Rep. 116.

¹⁰ Ilwaco R. & Nav. Co. v. Oregon S. L. & U. N. Ry., 57 Fed. 673, 6 C. C. A. 495, 5 Int. Com. Rep. 627.

be lines connecting with it, in order to have the situation in which the section applies.¹¹

§ 884. Extent of these requirements.

Contracts by a railroad company with other companies for the establishment of through routes and through rates for the continuous carriage of interstate traffic do not violate section 7 of the Act prohibiting a combination to prevent the carriage of freight from being continuous.¹² Nor is it violated by a refusal of the connecting carrier to take the goods at the valuation agreed on by the first carrier.¹³ What is an undue or unreasonable preference or advantage under section 3 of the Act is a question of fact, but, subject to militating circumstances, rates ought to be relatively equal and reasonable;¹⁴ and the carrier has no right to make rates so as to overcome the natural advantages of one place over another, or so as to build up one place or section at the expense of another.¹⁵ The point where traffic is interchanged in through routing is a matter for the carriers to determine in first instance unless they disagree.¹⁶ So far as undue preference in serving localities is concerned facilities may be denied in any manner, as by an unreasonable arrangement of time schedules.¹⁷ The provisions of the section apply not merely to the carriers themselves, but with equal force to their officers and employees; therefore the Act is violated by employees who by concerted action strike in order to avoid receiving cars from a connecting carrier.¹⁸

¹¹ *In Freight Bureau v. Cincinnati, N. O. & T. P. Ry.*, 4 Int. Com. Rep. 592, 6 I. C. C. 195.

¹² *Kentucky & I. Bridge Co. v. Louisville & N. R. R.*, 37 Fed. 571, 2 Int. Com. Rep. 351, 2 L. R. A. 289.

¹³ *Pennsylvania R. R. v. Hughes*, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. 132.

¹⁴ *State v. Adams Express Co.*, 171 Ind. 138, 85 N. E. 337.

¹⁵ *Morris Iron Co. v. B. & O. R. R. Co.*, 26 I. C. C. 240.

¹⁶ *Ch. of C. of Newport News v. Southern Ry.*, 23 I. C. C. 345.

¹⁷ *New York & N. Ry. v. New York & N. E. R. R.*, 50 Fed. 867, 4 Int. Com. Rep. 116.

¹⁸ *Toledo, A. A. & N. M. Ry. v. Pennsylvania Co.*, 54 Fed. 746, 5 Int. Com. Rep. 545.

§ 885. Demand for connecting service.

A carrier cannot be compelled to receive or deliver traffic at a point where another company has made a new connection with its roads, but has not provided proper facilities.¹⁹ The provision is merely negative; it does not affect either a contract or a State statute giving another carrier the right to use tracks and terminal facilities.²⁰ "Terminal facilities" as used in the Act refers to facilities for interchanging traffic between connecting lines.²¹ At the time of the passage of sections railroads were going so far as to refuse to accept or deliver traffic on any terms if it came by a connecting line which for some reason they desired to freeze out. This the Act was intended to correct and did correct, whether the common law would require so much or not. But the courts will not assume that the independence of railroads in making such arrangements as they pleased, short of palpable disregard of their legal duties, should be destroyed by any forced construction of the Act.²² It should be noted, however, that a connecting carrier without discrimination may always refuse to render service unless its charges are tendered it or secured to it, although it does not generally insist upon prepayment;²³ and, of course, it may refuse in taking over from one connection to advance the previous charges, although it does this in its dealings with other connections.²⁴

¹⁹ *Kentucky & I. B. Co. v. Louisville & N. R. R.*, 37 Fed. 571, 2 Int. Com. Rep. 102, 2 L. R. A. 289.

²⁰ *Iowa v. Chicago, M. & S. P. Ry.*, 33 Fed. 391, appeal dismissed; *Chicago, B. & Q. R. R. v. Iowa*, 145 U. S. 631, 36 L. ed. 857, 12 Sup. Ct. 978.

²¹ *Chicago F. P. C. Co. v. Chicago & N. W. Ry.*, 8 I. C. C. Rep. 316.

²² *Oregon Short Line & U. N. Ry. Co. v. Northern Pacific Ry. Co.*, 61 Fed. 158.

²³ *Little Rock & M. Ry. Co. v. St. Louis, I. M. & S. Ry. Co.*, 59 Fed. 400; *Little Rock & M. Ry. Co. v. St. Louis S. W. Ry. Co.*, 63 Fed. 775, 27 U. S. App. 380, 26 L. R. A. 192, 11 C. C. A. 417, affirming 59 Fed. 400.

²⁴ *Southern Indiana Exp. Co. v. United States Exp. Co.*, 92 Fed. 1022, 35 C. C. A. 172; *Gulf, C. & S. F. Ry. Co. v. Miami S. S. Co.*, 86 Fed. 407, 52 U. S. App. 732, 30 C. C. A. 142.

§ 886. Compulsory interchange of business.

In a recent terminal case ²⁵ the Commission found that the respondent company was so far committed by its course of business to the furnishing of terminal facilities to other railways entering the city, that it should be regarded as a public terminal, open to other lines upon the same conditions. The only ground, it would seem, upon which this decision could be rested was that, as this company had taken it upon itself to furnish a terminal, its facilities were at the disposal of other carriers, otherwise the action of the Commission would have been in the face of the explicit limitation of section 3 protecting a common carrier from invasion of its own facilities by another carrier.²⁶ It should be noted, however, that the Commission apparently felt in this case, as it has said squarely since, that the provisions of section 3 of the original Act have been made of less force by the Amendments beginning in 1906. The Commission now has power to order through routes and establish through connections from any point on any line under its jurisdiction to any point on any other trackage subject to the Act. Its doctrine now goes to the extent of holding that the public interest requires that any shipper from any one system should be able to get his goods properly transported at reasonable rates to any point on any other system. But it should be noted that even in these provisions for through service there is the limitation that the originating carrier should not in the route established be required to short haul itself.

²⁵ *St. L., S. & P. R. R. v. Peoria & P. W. Ry.*, 26 I. C. C. 226. Compare with these a later opinion in which it was said that a connecting carrier could not demand at a switching charge merely the utilization of the terminal trackage of a rival system. *Waverly Oil Wks. v. Pa. Ry.*, 28 I. C. C. 621. See § 176, *supra*.

²⁶ *Morris Iron Co. v. B. & O. R. R. Co.*, 26 I. C. C. 240. Carriers should establish through routes and joint rates so that there may be the freest movement of traffic without the necessity of reshipment. *Enterprise Fuel Co. v. Penna. Ry.*, 16 I. C. C. 219.

§ 887. Through arrangements once not obligatory.

At common law one public service could not be compelled to enter into arrangements with another for continuous service as a single unit for a single rate. Through arrangements were left altogether to such private agreements as the parties should negotiate. This is well explained in the leading case of the Atchison, Topeka & Santa Fe Railroad Co. v. Denver & New Orleans Railroad²⁷ where the Supreme Court squarely held that a railroad might enter into through traffic agreements with one railroad, prorating its through rate, and at the same time refuse to enter into a similar agreement with another railroad traversing the same territory as the first and having the same terminus. "He puts himself in no worse position, by extending his route with the help of others, than he would occupy if the means of transportation employed were all his own. He certainly may select his own agencies and his own associates for doing his own work."²⁸

§ 888. Carrier might formerly select route.

It follows that, as far as legal obligation goes, the carrier itself has entire control over the situation until by legislation some commission has been given jurisdiction to take such action as may be required, and has thereupon issued orders in the exercise of the powers conferred upon it. In the case of Southern Pacific Ry. v. Interstate Commerce Commission,²⁹ the United States Supreme Court held legal the policies then pursued by the Pacific railroads for picking out their through connections beyond their terminals as might best suit their own interests. As the court clearly said in its decision: "The important facts that control the situation are that the carrier need not agree to carry beyond its own road, and may agree upon joint through tariff rates or not, as seems best for its

²⁷ 110 U. S. 667, 28 L. ed. 291, 4 Sup. Ct. 185.

²⁸ A carrier need not prorate with one connection upon the same terms

that it does with another. *Samuels v. Louisville & N. Ry. Co.*, 31 Fed. 57.

²⁹ 200 U. S. 536, 50 L. ed. 585, 26 Sup. Ct. 330.

own interests. Having these rights of contract the carrier may make such terms as it pleases, at least so long as they are reasonable and do not otherwise violate the law."³⁰ This is, however, changed by the provisions of the recent Amendments which require the through routes to be named by the carrier and the shippers given their choice thereof.

§ 889. Present scope of the Act.

Central Stockyards v. Louisville & Nashville Railroad is one of the latest cases in the United States Supreme Court involving the scope of section 3. Mr. Justice Holmes there cites with approval the former cases,³¹ holding that the making of special arrangements for through service with one connecting carrier did not of itself constitute a violation of the Act. This seems to be a fundamental principle, that, where there is no duty to do something for customers generally, there is none to do it for a carrier applying. And it should be added that, where there is no legal duty, there can be no illegal discrimination. It may be noted that long ago one court³² did apparently hold that if a railroad made joint rates at proportional division with one connecting carrier, it violated the Act by insisting that another connecting carrier must hand the goods over to be taken at the local rate. But this early case was concerned largely with other issues; and it may be that it goes no further than to show that the local rate was too high; at all events, it has been practically ignored in subsequent decisions, and it has, therefore, generally been agreed by text-writers that it has been for all practical purposes overruled on the point for which the complainant apparently cites it.

³⁰ The Act left the railroads free as before to make such arrangements for through routing, billing, or rating as they pleased without its being a refusal of equal facilities for the interchange of traffic to make such through arrangements with one com-

pany while refusing to do so with another. *Gulf, C. & S. F. Ry. Co. v. Miami S. S. Co.*, 86 Fed. 507.

³¹ 192 U. S. 568, 48 L. ed. 565, 24 Sup. Ct. 339.

³² *Augusta S. Ry. v. W. & T. R. R.*, 74 Fed. 522.

§ 890. Duty to deliver to connections.

In several kinds of connecting service the duty of each successive party to deliver over to the next in turn is the normal one. Thus a telegraph company undertakes delivery in the place of address, which in this case should be at the office of the telegraph company designated as the connection. So, in certain kinds of carriage, as express service, the carrier is bound to deliver to the addressee. But the railroads and steamboats are not normally bound to do more than deposit the goods carried on their own wharves or at their own terminals. It is universally established, however, that when connecting carriage is involved the law necessarily throws upon each carrier in turn the duty of tendering the goods for further transportation to the succeeding carrier; and normally, until he effectuates such delivery, the original carrier remains liable as a common carrier.³³ This liability would usually continue, as the cases just cited hold, until the first carrier has deposited the goods where the second carrier actually receives them, and given notice, as would generally be requisite, to the succeeding carrier that the goods are there awaiting his transportation.³⁴

§ 891. Policy of recent legislation.

In view of the tendency to extend the power of the Commission to force not merely through billing and joint rates but through service and physical connections as shown in the recent amendments to the Act, it is well worthy of particular remark that the powers granted commissions in this respect now go so far as to authorize the making of orders as to convenient connections. It is characteristic of the new appreciation of the extent of public duty that the United States Supreme Court finds no difficulty with these statutes. Speaking of the objection raised to the

³³ *Lewis v. Chesapeake & Ohio Ry. Co.*, 47 W. Va. 656, 35 S. E. 908.

³⁴ *Mountain Fruit Co. v. Southern Pac. Ry. Co.*, 118 Cal. 648, 46 Pac. 668, 50 Pac. 775, 40 L. R. A. 78.

regulation of the conduct of one public service in its relations with another for the benefit of all concerned, that court said in what seems certainly destined to be a leading case:³⁵ "This reduces itself to the contention that, although the governmental power to regulate exists in the interest of the public, yet it does not extend to securing to the public reasonable facilities for making connection between different carriers. But the proposition destroys itself, since at one and the same time it admits the plenary power to regulate and yet virtually denies the efficiency of that authority."³⁶ With these policies in mind Congress has by the Hepburn Act of 1906 given the Commission power to compel switch connections with a lateral branch where all the conditions were appropriate; and by the Panama Act of 1912, even larger powers were given to compel the physical connection of railroad trackage and water terminals.

Topic D. Compulsory Joint Through Rating

§ 892. Jurisdiction of the Commission.

By the Hepburn Act of 1906 the power then for the first time granted to the Commission to establish through routes was limited to instances in which no satisfactory through route existed.³⁷ Under the law since the Mann Act of 1910 the existence of through routes capable of adequately and expeditiously handling all traffic is entitled to consideration, but no longer constitutes a bar to the establishment by the Commission. The Commission has power to order the establishment of a through route and joint rate although there are in existence other through routes capable of adequately and expeditiously handling all traffic.³⁸ The Commission will exercise its power to

³⁵ *Atlantic C. L. Ry. v. No. Car. Corp. Comm.*, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. 585.

³⁶ See *United States v. Baltimore & O. S. W.*, 226 U. S. 14, 33 Sup. Ct. 5.

³⁷ See *Interstate Commerce Commission v. No. Pac. Ry.*, 216 U. S. 538, 30 Sup. Ct. 155.

³⁸ *Flour City S. S. Co. v. L. V. R. R.*, 24 I. C. C. 179.

fix joint rates whenever and only where the circumstances and conditions of the case clearly warrant it. Even though it be shown that a railroad is a common carrier, it may be that the purposes of the Act will not be served but will be defeated by the establishment of joint rates with it.³⁹ Distance is an important element in determining whether routings are or would be satisfactory, and in these proceedings this element weighs against the establishment of proposed routes.⁴⁰ The provision of section 1 imposing the duty of establishing through routes should not be subjected to a narrow construction, but should be read in connection with the latter part of section 3, in connection with section 15, and with regard to the intentment of the Act as a whole and the correction of the evils it has sought to remedy.⁴¹ The first section gives the shipper a right to a through route and a reasonable rate; but the rate open to him need not be a joint rate, and the mere fact that no joint rate already exists does not lay upon the Commission any absolute requirement to establish one.⁴²

§ 893. Discretion in its exercise.

The Commission has plainly enough acted upon the policy of refusing to force the establishment of new routes against the desire of a carrier affected, where other routes properly designed to serve the public are in existence. Unless a public necessity for an additional service appears, the Commission will not compel a railroad against its will to enter into arrangements which the management do not consider as advantageous. It has been often pointed out that the Act as amended established no right which it was bound to recognize in any way, but only empowered the Commission to establish such through rates as it felt in its own discretion the necessities of the situation re-

³⁹ *McCloud River Lumber Co. v. S. P. Co.*, 24 I. C. C. 89.

⁴⁰ *United States v. U. P. R. R.*, 28 I. C. C. 518.

⁴¹ *Flour City S. S. Co. v. L. V. R. R.*, 24 I. C. C. 179.

⁴² *Chamber of Commerce of Milwaukee v. C., R. I. & P. Ry.*, 15 I. C. C. 460.

quired.⁴³ The law does not go to the extent of requiring the Commission in all cases where no through route and joint rate exists, to establish a route and fix a rate applicable thereto, but only empowers it to do so in a proper case for the purpose of giving effect to the Act.⁴⁴ The Commission has little sympathy with, and will not ordinarily lend its aid to, an effort by one road to secure traffic that is reasonably tributary to another road by compelling the latter to join with it in through routes and rates.⁴⁵ The Commission has often declared that the purpose of sections of the Act relating to the establishment of through routes and joint rates is to afford relief to a shipping community; and the Commission will not aid carriers simply to acquire strategic advantages in their contests with one another.⁴⁶

§ 894. Limitations upon the Commission.

Carriers should freely interchange freight between their respective lines to the end that interstate commerce may move without interruption or delay.⁴⁷ The Commission's power to require institution of through routes and joint rates is predicated upon there being no reasonable or satisfactory through route in existence.⁴⁸ There is a distinction to be taken at the outset between two situations, which, as the history of the jurisdiction confided to the Commission shows have been generally considered as very different.⁴⁹ When it is simply a question of compelling a carrier to enter into through arrangements for the handling of traffic to and from points beyond the gateways of its lines, Congress has now made the jurisdiction of the Commission sweeping. In the case of the establishment of

⁴³ *Loup Creek Colliery Co. v. V. Ry.*, 12 I. C. C. 471.

⁴⁴ *Barr Bros. M. Co. v. M. P. Ry.*, 17 I. C. C. 225.

⁴⁵ *Cincinnati & C. T. Co. v. B. & O. S. W. R. R.*, 20 I. C. C. 486.

⁴⁶ *Chicago & M. El. Ry. v. I. C. R. R.*, 13 I. C. C. 20.

⁴⁷ *Flour City S. S. Co. v. L. V. R. R.*, 24 I. C. C. 179.

⁴⁸ *Southern California Sugar Co. v. S. P. L. A. & S. L. R. R.*, 19 I. C. C. 6.

⁴⁹ *Iowa State Board of R. R. Com'rs v. A. E. R. R.*, 28 I. C. C. 563.

extensions of existing lines by this process of establishing through routes, it is left to the discretion of the Commission to determine whether there is sufficient public necessity to call for action.⁵⁰ But where it is a question of establishing new routes reaching within the territory naturally served by a transportation system, Congress has had the sound theory that the existing business which the system is competent to handle should not be diverted from its own lines by compelling it to enter into new connections at points within its territory, if the routes which it has established are practicable ones.⁵¹ Thus a trunk line carrier which purchases a branch line road is justified in canceling through joint rates with another carrier when such cancellation will tend to move traffic entirely over its own line under reasonable and non-discriminatory rates to the exclusion of the former two-line haul.⁵²

§ 895. The policies involved therein.

The statute provides that, in establishing joint rates and through routes, each carrier against which the order is made shall be given the benefit of the long haul by its own line. The Commission has said repeatedly that it cannot, therefore, establish in every case, where it might otherwise be inclined to act, a through route and a joint rate, but must work under the limitation imposed by the Act of Congress as above set forth.⁵³ The Commission cannot order a railroad to embrace substantially less than entire length of its railroad in a through route.⁵⁴ Defendants have right to hold traffic to their own lines so long, but only so long, as in so doing they do not encroach upon the rights of the public.⁵⁵ The Commission, with the

⁵⁰ *McCullough v. L. & N. R. R.*, 25 I. C. C. 48.

⁵¹ *Re Advance in Class & Commodity Rates*, 23 I. C. C. 263.

⁵² *In re Proposed Rate on Lumber*, 20 I. C. C. 575.

⁵³ See *Investigation of Alleged*

Unreasonable Rates on Meats, 23 I. C. C. 658.

⁵⁴ *Davis Bros. Lumber Co., Ltd., v. C., R. I. & P. Ry.*, 26 I. C. C. 257.

⁵⁵ *Aransas Pass Channel & Dock Co. v. G. H. & S. A. Ry.*, 27 I. C. C. 403.

qualifications which are being discussed, recognizes the right of a carrier to retain tonnage to its line;⁵⁶ and the long haul is generally conceded to the originating line.⁵⁷ Thus lumber is held to rails of carriers transporting logs from forests by transit arrangements.⁵⁸ And generally speaking, if a sufficient and fairly satisfactory through route between points does not exist, another route will not be compelled.⁵⁹ But in order to build up enterprises of the same character on its own line and to prevent the trade of its local industries from being displaced by the competition of manufacturers of the same commodities on connecting lines, a carrier cannot deny to industries on the lines of such connections the benefit of through routes and joint rates.⁶⁰

§ 896. Protection from short hauling.

Under the Act as amended in 1910 the Commission cannot require any company without its consent to embrace in a through route substantially less than the entire length of its railroad, unless to do so would make such through route unreasonably long as compared with another practicable through route, which could otherwise be established.⁶¹ In the formation of through routes a carrier has a right to protect its own long haul and a carrier may not be required against its will to participate in a through route between any two points which does not include all or substantially all of its line or lines between those points, except when an unreasonably long or circuitous route would otherwise be created.⁶² Joint rate and through route was recently

⁵⁶ *Suffern Grain Co. v. I. C. R. R.*, 27 I. C. C. 192.

⁵⁷ *Salt Rates from Wisconsin to Iowa*, 27 I. C. C. 526.

⁵⁸ *Lumber Rates from Memphis and other Points to New Orleans*, 27 I. C. C. 471.

⁵⁹ *Blakely So. R. R. v. A. C. C. Ry.*, 26 I. C. C. 344.

⁶⁰ *Cardiff Coal Co. v. Chicago, M. & St. P. R. R.*, 11 I. C. C. 460.

⁶¹ *Commercial Club of Superior v. B. N. Ry.*, 24 I. C. C. 96.

⁶² *Chamber of Commerce of New York v. N. Y. C. & H. R. R.*, 24 I. C. C. 55.

denied because the carrier would have to participate in traffic embracing substantially less than the entire length of its line.⁶³ Under the provisions of the Act requiring the Commission in establishing joint rates to give the carriers the benefit of the long haul, it was held in another late case to be doubtful whether the Commission could establish a joint through rate, thereby depriving the New York Central of the longer haul on this business, either rail-and-lake or all rail.⁶⁴ And a carrier was permitted to give up a through route voluntarily maintained for four years which embraced substantially less than the entire length of its railroad.⁶⁵ In establishing any through route no railroad should be required to haul traffic over less than the entire length of its line unless such route is unduly circuitous.⁶⁶ Distance is an important element in determining whether a routing is satisfactory, since a circuitous route involving a longer haul and therefore greater delay would not be, ordinarily, as desirable as a direct one.⁶⁷ But a route satisfactory to one kind of freight might not be satisfactory with respect to another.⁶⁸

§ 897. What routes considered circuitous.

Section 15 merely ordains that between two given points a carrier shall not be deprived of a haul which it is capable of providing by a reasonably direct route.⁶⁹ A line 153 miles longer is circuitous where it exceeds the short line by 15 per cent or more.⁷⁰ A petition to establish a through route 100 per cent longer was recently dismissed.⁷¹ A route only 4 per cent longer than the short line is

⁶³ *United States v. U. P. R. R.*, 28 I. C. C. 518.

⁶⁴ *Southwestern Shippers' Traffic Ass'n v. A., T. & S. F. Ry.*, 24 I. C. C. 570.

⁶⁵ *Rates on Cottonseed and its Products*, 28 I. C. C. 219.

⁶⁶ *Pacific Coast Lumber M'frs Ass'n v. N. P. Ry.*, 14 I. C. C. 51.

⁶⁷ *In Re Through Passenger Routes*, 16 I. C. C. 300.

⁶⁸ *Waverly Oil Works v. P. R. R.*, 28 I. C. C. 621.

⁶⁹ *Meridian Fertilizer Factory v. T. & P. Ry.*, 26 I. C. C. 351.

⁷⁰ *Edwards & Bradford Lumber Co. v. C., B. & Q. R. R.*, 25 I. C. C. 93.

⁷¹ *Haverhill Box Board Co. v. B. & A. R. R.*, 28 I. C. C. 336.

not markedly circuitous.⁷² In one case⁷³ it was said conclusively that not only was the route via Memphis to the Ohio River practicable, but it includes an average haul of 319 miles over the lines of the Rock Island, as against an average haul over the Rock Island of only 18.5 miles via the Ruston route. It is scarcely to be expected, said the Commission, in a late case involving a New England system,⁷⁴ that a carrier that may have a haul of 120 miles would be satisfied with a haul of but 6 miles with the meager earnings accruing under its established divisions. Nor is it reasonable even for a shipper to demand that a carrier should be so short hauled, except upon a clear showing that the service over the other route was not satisfactorily maintained and reasonably prompt.

§ 898. Power of the Commission to fix divisions.

In fixing a division between carriers of joint rates ordered to be established, section 15 of the Act implies that it is the duty of the Commission to take into consideration all the circumstances and equities fairly affecting their several interests, and precludes the idea that the divisions must be adjusted on a mileage or any other fixed basis.⁷⁵ The fact that carriers, by whom a rate has been lawfully published and advertised to the shipping world as the cost between two given points over all reasonably available routes, have neglected or failed to agree upon divisions of the rate over one of the routes, cannot be accepted by the Commission as equivalent to a nullification of the published through rate over that route.⁷⁶ And, generally speaking, mere failure to agree upon divisions of joint rates, which rates are admitted to be reasonable, will not be accepted as justification for an increase.⁷⁷ Shippers should not suffer

⁷² *Bowling Green Business Men v. L. & N. R. R.*, 24 I. C. C. 228.

⁷³ *Davis Bros. Lumber Co. v. C., R. I. & P. Ry.*, 26 I. C. C. 258.

⁷⁴ *Advances in Rates from Chicago*, 23 I. C. C. 263.

⁷⁵ *Star Grain & Lumber Co. v. A., T. & S. F. Ry.*, 14 I. C. C. 364.

⁷⁶ *Germain Co. v. N. O. & N. E. R. R.*, 17 I. C. C. 22.

⁷⁷ *New Mexico Coal Rates*, 28 I. C. C. 328; *Chicago Lighterage*

because of delay on the part of defendants in agreeing on proper divisions, and in publishing the lower rate.⁷⁸ If defendants are unable to agree upon the manner of constructing the rates herein ordered, or upon the divisions of such rates, the Commission will enter such supplementary order as may be necessary.⁷⁹ But, in first instance, how a joint through rate shall be divided is a matter of agreement and bargain between the carriers.⁸⁰ The doctrine of the Commission is that shippers have no interest in the division of a rate.⁸¹ The shipper pays for complete service, and has no concern as to how through charges are divided among carriers.⁸²

§ 899. How divisions are determined.

The Commission has many times expressed the view that the division received by a carrier as its share of a joint rate is not conclusive evidence of the unreasonableness of the joint rate involved.⁸³ Where divisions are determined by highly competitive conditions, they throw no light on the reasonableness of joint rates.⁸⁴ If local or individual rates were to be measured by divisions of through rates it would lead to a continuous process of hammering down local rates or withdrawal by carriers from such through routes as yield only a small profit.⁸⁵ Divisions of through rate furnish no just or fair criterion by which to measure intermediate local rates on the same line of transportation.⁸⁶ Divisions of joint rates are ordinarily not published and

Charges, 28 I. C. C. 390; Oklahoma Grain Rates, 28 I. C. C. 462; Kansas City & M. Ry. Co. Rate Cancellation, 28 I. C. C. 640.

⁷⁸ Williamette Pulp & Paper Co. v. N. P. Ry., 18 I. C. C. 388.

⁷⁹ Farmers' Co-operative and Educational Union v. G. N. Ry., 17 I. C. C. 406.

⁸⁰ In re Advances on Barley, 24 I. C. C. 664.

⁸¹ In re Advances on Coal, 24 I.

C. C. 43; M'fres & Merchants' Ass'n v. A. & A. R. R., 24 I. C. C. 331.

⁸² Interior Iowa Cities Case, 28 I. C. C. 64.

⁸³ Wichita Board of Trade v. A., T. & S. F. Ry., 25 I. C. C. 625.

⁸⁴ Wichita Board of Trade v. A., T. & S. F. Ry., 25 I. C. C. 625.

⁸⁵ Id., 26 I. C. C. 146.

⁸⁶ Board of Trade of Winston-Salem v. N. & W. Ry., 16 I. C. C. 12.

are subject to change by mutual agreement of carriers.⁸⁷ A proportional rate is not to be compared with a local rate to show a violation of section 4.⁸⁸ The divisions of a joint through rate accepted by a carrier cannot be taken as the measure of the reasonableness of its separately established rates.⁸⁹ The Commission can always require filing of divisions, and a joint rate under agreed divisions definitely fixes lawful earnings of parties to that rate.⁹⁰ The Commission may look at the several factors in an effort to locate unreasonableness in total charge.⁹¹

§ 900. Theories of basing divisions.

It is generally true that a carrier may reasonably accept less than its local rate as its division of a joint rate.⁹² In arranging the divisions among the connecting carriers due consideration should be given by the connecting carrier to the surrender by the originating carrier of its right to retain possession of the shipment for the longest possible haul over its own lines, and the division should be agreed upon which will compensate the originating carrier for its sacrifice.⁹³ The fact that the system in question reaches other primary grain markets may fairly be said to give it certain equities in the adjustment of the divisions of any through rates that it may establish under an order of the Commission.⁹⁴ The line performing the terminal service is entitled to a greater division than the line relieved of such service.⁹⁵ Divisions accruing to more distant common or basing points may be accepted as rates to noncompeti-

⁸⁷ In re Restricted Rates, 20 I. C. C. R. 426.

⁸⁸ In re Lumber Rates, 25 I. C. C. 50.

⁸⁹ Acme Cement Plaster Co. v. L. S. & M. S. Ry., 17 I. C. C. 30; Manahan v. N. P. Ry., 17 I. C. C. 95.

⁹⁰ In re Restricted Rates, 20 I. C. C. R. 426.

⁹¹ People's Fuel & S. Co. v. G. T. W. Ry., 27 I. C. C. 24.

⁹² Sandstone, Minn.-Missouri River Building Stone Rates, 28 I. C. C. 269.

⁹³ In re Express Rates, 24 I. C. C. 380.

⁹⁴ Chamber of Commerce of Milwaukee v. C., R. I. & P. Ry., 15 I. C. C. 460.

⁹⁵ Waverly Oil Works v. P. R. R., 28 I. C. C. 621.

tive points.⁹⁶ Divisions in the interior are based on sum of intermediates, but earnings on traffic are not divided east and west of rivers on any such basis, the proportional rate from river crossing to interior point being usually higher than local rate from river to that point.⁹⁷ The rail carrier's division of joint through rail-and-water rate may well be lower than its just local charges; but if steamships are content to take materially less than at present for their division, that is a substantial reason for reducing the total through charge.⁹⁸ For example, on rail-and-water haul from New York via Galveston to Wichita, the rail carrier with a rail mileage of 700 miles was given to two-thirds of the net amount for division, while the water carrier with a water mileage of slightly less than 2,200 miles would be entitled to one-third.⁹⁹

§ 901. Constructive mileage.

In the adjustment of interline accounts between carriers an expensive bridge is ordinarily considered as having constructive mileage, and the division of joint rates made upon that basis.¹ In the division of rates between rail and water carriers, one land mile is constructively reckoned as equivalent to two nautical miles north of Cape Hatteras, while to the south of the Cape one land mile is equal to three nautical miles.² An arbitrary basis of divisions ignores differences in length of haul; mileage prorate basis of divisions divides earnings according to service performed.³ But certain carriers may be situated so as to command a liberal allowance from its connections in divisions of through rates.⁴ Comparisons of divisions re-

⁹⁶ *Id.*, 28 I. C. C. 178.

⁹⁷ *Interior Iowa Cities Case*, 28 I. C. C. 64.

⁹⁸ *Southwestern Shippers' Traffic Ass'n v. A., T. & S. F. Ry.*, 24 I. C. C. 570.

⁹⁹ *Southwestern Shippers' Traffic Ass'n v. A., T. & S. F. Ry.*, 24 I. C. C. 570.

¹ *Norman Lumber Co. v. L. & N. R. R.*, 22 I. C. C. R. 239.

² *South Atlantic Waste Co. v. S. Ry.*, 22 I. C. C. R. 293.

³ *Stacy & Sons v. O. S. L. R. R.*, 20 I. C. C. R. 136.

⁴ *Board of Trade of Winston-Salem v. N. & W. Ry.*, 20 I. C. C. 146.

ceived by carriers may be considered in connection with other evidence in determining the reasonableness of a particular rate.⁵ But it must be realized that a carrier may deem it good business policy to secure a part of a through haul on a large volume of traffic and to accept a division of the through rate which is much lower than local rates.⁶ And also some rates may be under necessity of accepting abnormally low divisions in order to participate in traffic.⁷ On the other hand, a carrier may be situated with reference to points of supply and demand, or otherwise, so that it is in a position to command a liberal allowance from its connections in divisions of through rates.

⁵ *Lindsay Bros. v. L. S. & M. Ry.*,
22 I. C. C. R. 516.

⁷ *Board of Trade of Winston-Salem v. N. & W. Ry.*, 26 I. C. C.

⁶ *New Pittsburg Coal Co. v. H. V. Co.*, 26 I. C. C. 121.

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CHAPTER XIX

EQUALITY OF SERVICE

- § 910. Provisions of the Act.
- 911. Extension of service facilities.

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- 921. Orders concerning freight delivery.
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Topic C. Supply of Equipment

- § 930. Basis of the duty to supply equipment.
- 931. Commission jurisdiction over facilities.
- 932. The obligation treated reasonably.
- 933. Provision of special equipment.
- 934. Demand foreseen although unusual.
- 935. Reasonable time to increase facilities.
- 936. Carriage through in same car.
- 937. Provision of cars in through service.

Topic D. Distribution of Equipment

- § 938. Discrimination in use of cars.
- 939. Jurisdiction of the Commission.
- 940. Order of preference between shippers.

§ 941. Where no preference justifiable.

942. Basis of prorating cars.

943. Respective requirements compared.

944. Cars needed by railroads.

945. Private facilities considered in the apportionment.

§ 910. Provisions of the Act.

No provisions giving the Commission jurisdiction to order the rendering of service as such were in the original Act; the beginning of these powers was in the 1906 amendments. According to a fundamental clause now inserted in section 1 it is provided that the jurisdiction of the Commission over railroads shall include all bridges and ferries, and shall also include switches and spurs, tracks and terminal facilities and freight depots, and train yards and station grounds and railway trackage, whether owned outright or operated under agreement. The Act defines transportation as including cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. By express provision of the Act as amended it is made the duty of every carrier subject to the jurisdiction of the Commission to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto; and to provide reasonable facilities for operating such through routes and to make reasonable rules and regulations with respect to the exchange, interchange, and return of cars used therein, and for the operation of such through routes, and providing for reasonable compensation to those entitled thereto. Furthermore, by section 15, as has been said, the Commission has full power over the provision of such facilities and the charges for such services by the carrier and over the scheduling thereof and allowances therefor when not performed by the carrier itself; and in the case of

through service the determining of the route which shall be offered, and the divisions between the carriers of the joint rate.

§ 911. Extension of service facilities.

Later in section 1 it is provided that the Commission shall have jurisdiction to compel any common carrier subject to the provisions of the Act, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, to construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper, provided that this shall not apply to passenger railways not committed to carrying freight. It should be added that by section 8 as recently amended by the Panama Act the Commission has special powers to compel the construction and maintenance of physical connections between rail lines and steamship docks on substantially the same terms as to practicability of construction and probability of profit, the Commission having power to order the extension of railroad trackage to serve water terminals, or to order the connection of railway trackage of water terminals with the railroad systems serving the port, on such terms as to respective payments by the parties involved in the connecting service as to it may seem proper.

Topic A. Duty to Render Service

§ 912. General obligation to serve all.

One who is engaged in public calling must by virtue of his public duty serve many whom he is very unwilling to

serve, for one reason or another. A company cannot capriciously discriminate between passengers on account of their nativity, color, race, social position, or their political or religious beliefs. Whatever discriminations are made must be on some principle, or for some reason, that the law recognizes as just and equitable, and founded in good public policy. What are reasonable rules is a question of law, and is for the court to determine, under all the circumstances in each particular case. It is fundamental with the Commission that every carrier owes a duty to the entire public, and each owes a particular duty to persons and communities which it directly serves and which are dependent upon it.²¹ As the Commission has said comprehensively, equality between great and small is one of the underlying principles of the Act.²²

§ 913. Extent of federal supervision.

A common carrier in interstate commerce is free to exercise all its rights under the common law to the full extent, unless such exercise has been made unlawful by the Act.²³ Many of the older court decisions, it should be noted, were rendered prior to the amendments to the Act, making it the duty of the carrier to provide transportation and to furnish facilities therefor under the supervision and direction of the Commission. Any regulation or practice that withdraws from a shipper the equal opportunity of taking advantage of the rates offered by a carrier, is held to be a regulation or practice, "affecting rates," within the meaning of that phrase as used in section 15.²⁴ But it is well settled that carriers have the right to transport certain commodities under reasonable rules and regulations respecting their receipt, carriage and delivery.²⁵ And in general it

²¹ See *Advance in Rates Cases* of 1910, 20 I. C. C. 243.

²² *Harbor City Wholesale Co. of San Pedro v. S. P. Co.*, 19 I. C. C. 323.

²³ *McElvain v. Railroad*, 151 Mo. App. 126, 151, 131 S. W. 736.

²⁴ *St. L., S. & P. R. R. v. P. & P. U. Ry.*, 26 I. C. C. 226.

²⁵ *Rail & River Coal Co. v. B. & O. R. R.*, 14 I. C. C. 86.

may be said that the control of service is by degrees coming under the jurisdiction of the Commission by a course of extension by amendments to the Act quite parallel to the history of the development of the powers of the Commission over rates.²⁶

§ 914. Rulings of the Commission.

It is the right of a carrier to decline to receive for transportation any merchandise not plainly marked.²⁷ Inferior, insecure tags may be prohibited; but no justification was found for a rule which required metal eyelets at an additional expense of 15 cents per 100. That certain perishable freight should at times be refused for sufficient reason—as because of risk—has seemed reasonable; but the Commission is not convinced of the reasonableness of refusing to receive green hides when carriers have the right, under tariff provisions, to delay shipment for suitable equipment.²⁸ Packages containing fragile articles consisting wholly or in part of, or contained in glass, must be plainly marked to indicate contents. And in the revision of the practices of the express companies, it was recognized that the rules might be positive on the requirement of safe packing.²⁹ But a rule has been condemned which provided for higher rate on packages not properly marked.³⁰ The law requires carriers to observe and enforce reasonable regulations and practices affecting the receipt, handling, transporting, and delivery of property.

§ 915. Different treatment constitutes discrimination.

It is apparently established beyond question as to common carriers that as no one has a right to have service without prepayment there could be no complaint made if some are given service without requiring prepayment of

²⁶ *National Petroleum Ass'n v. L. & N. R. R.*, 15 I. C. C. 473.

²⁷ *Ellsworth Produce Co. v. U. P. R. R.*, 17 I. C. C. 182.

²⁸ *Western Classification Case*, 25 I. C. C. 442.

²⁹ *In re Express Rates*, 24 I. C. C. 380.

³⁰ *C. H. Algert Co. v. D. & R.*, 18 I. C. C. 21.

them, while others are obliged to pay in advance.³¹ The cases go far in holding a carrier not liable for demanding prepayment of freight for goods addressed to certain consignees while accepting goods addressed to other consignees without prepayment.³² It is a carrier's right to demand prepayment on all shipments; but it may not distinguish in the rates charged between persons who pay in advance and those who do not.³³ It may be provided by a rule that a shipper who refuses to furnish a return address should be required to prepay express charges.³⁴ And a rule of the carrier that no cars would be received from connecting lines for switching unless all freight charges were prepaid was not condemned.³⁵ While carriers may provide by definite tariff provisions free from undue discrimination, for the advancement of storage or transfer charge, the Commission is without authority to compel them to do so.³⁶

§ 916. Scope of present jurisdiction.

The power over service is often of even greater importance than the rate itself. But the Commission has said very recently that, generally speaking, it has no power whatever to order a railroad to operate its trains in ways

³¹ *Randall v. Railroad*, 108 N. C. 612, 13 S. E. 137; *Brown & B. Coal Co. v. Grand Trunk Ry. Co.*, 159 Mich. 565, 124 N. W. 528.

Consequently a carrier may take goods from one connecting carrier with which it is closely allied, not only not demanding its charges in advance, but also advancing to the preceding carrier the accrued charges while refusing both favors to a rival connection. *Southern Indiana Exp. Co. v. United States Exp. Co.*, 92 Fed. 1022, 35 C. C. A. 172.

³² *Gamble-Robinson Commission Co. v. Chicago & N. W. Ry.*, 168 Fed. 161, 94 C. C. A. 217.

There may be prepay stations at

which the carrier delivers freight to the consignee directly, and without the intervention of a local agent, and to which consequently consignments are accepted only upon the condition of charges for transportation being prepaid by the shipper. *Bird v. Railroads*, 99 Tenn. 719, 63 Am. St. Rep. 856.

³³ *Boise Commercial Club v. Adams Express Co.*, 17 I. C. C. 115.

³⁴ *In re Express Rates*, 24 I. C. C. 380.

³⁵ *Hollingshead & Co. v. P. Co.*, 25 I. C. C. 38.

³⁶ *Western Classification Case*, 25 I. C. C. 442.

it might feel to be in the interest of the public or to maintain its property as it might feel would be conducive to the safety of its patrons.³⁷ And in another late case, it disclaimed any power of a general character to compel the performance of service to the extent of ordering an express concern which had sold out to resume business.³⁸ On the other hand, whatever service is established by the carrier must be duly performed in accordance with the undertaking. A carrier under the Act as amended may not lawfully refuse transportation as therein defined, but must, upon reasonable request, afford the same upon established rates filed and kept posted as required by law.³⁹ When the rules put upon the shipper the risk of damage from freezing, the Commission has said ⁴⁰ that there is no occasion for a further rule permitting the carrier to refuse a shipment altogether.⁴¹

§ 917. Freight embargo as an excuse.

An embargo may be justifiable because of the physical inability of the carrier for some reason to deal with traffic which is overwhelming it; but an embargo placed against connecting carriers because of their failure to promptly return cars is not consonant with the service which carriers constituting through routes are required by law to give.⁴² It may be laid down as a general rule, admitting of no qualification, that a manufacturer or merchant, who has traffic to move and is ready to pay a reasonable rate for the service, has the right to have it moved, and to have reasonable rates established for the movement, regardless of the fact that the revenues of the carrier may be reduced

³⁷ New England Investigation, 27 I. C. C. 560.

The Commission has no power to take action upon a complaint that an insufficient number of trains are run. I. C. C. Conference Ruling No. 296.

³⁸ Douglass Shoe Co. v. Adams Express Co., 19 I. C. C. 539.

The Commission cannot prevent

the discontinuance of a train. I. C. C. Conference Ruling No. 296.

³⁹ Waxelbaum & Co. v. A. C. L. R. R., 12 I. C. C. 178.

⁴⁰ Protection of Potato Shipments in Winter, 28 I. C. C. 681.

⁴¹ Dubuque Shippers' Ass'n v. C. & N. W. Ry., 26 I. C. C. 565.

⁴² Missouri & Illinois Coal Co. v. I. C. R. R., 22 I. C. C. 39.

by reason of his competition with other shippers in the distant markets; and he has the right also to have the benefit of through routes and reasonable joint rates to such distant markets if no "reasonable or satisfactory" through routes already exist.⁴³ If, when the line is blocked by freight, the carrier forwards first those goods which are most necessary to the public, it can hardly be said that the carrier is not performing its public duty; thus it is not improper that livestock, perishable freights, and material or supplies for the railroad should be excepted from any embargo imposed.⁴⁴ If during a famine period in supplying the necessities of life a railroad is not able to supply cars for its other traffic, it will be considered that no unjust discrimination is shown.⁴⁵

§ 918. Carriers discriminating against its rivals.

Although there was formerly much doubt it is now held that jobbers are shippers; and that every shipper is entitled to reasonable rates, but the right of a middleman as such to complain of a blanket rate has been questioned by the Commission in a recent proceeding.⁴⁶ It is all a question of getting at the true intent of the legislative provisions by proper interpretation; and the courts have recently held⁴⁷ that forwarders collecting goods of others were as much within the Act as other shippers, and could not be refused carload rates enjoyed by others.⁴⁸ An analogous case would be if one railroad should make application to another railroad inimical to it to forward some materials to an intersecting point. It is submitted that it is the clear duty of the railroad to which this application is made to accept the shipment, although it might benefit

⁴³ Cardiff Coal Co. v. Chicago W. & S. P. R., 11 I. C. C. 460. v. C., B. & Q. R. R., 19 I. C. C. 71.

⁴⁴ U. S. Daish & Sons v. C. A. & C. Ry., 9 I. C. C. 513.

⁴⁵ Wagner, Zagelmeyer & Co. v. D. & M. Co., 13 I. C. C. 160.

⁴⁶ Billings Chamber of Commerce

⁴⁷ Interstate Commerce Commission v. D. L. & W. Ry., 220 U. S. 235, 31 Sup. Ct. 392.

⁴⁸ See Lunquist v. Grand Trunk Ry., 121 Fed. 115.

much this road to which the application is made to cripple its rival by refusing to transport the supplies.⁴⁹ A carrier must accede to every proper application for service, although it might be more profitable to promote its own interests by imposing conditions, or even by refusing altogether.⁵⁰

§ 919. Railroad cutting its own rates for itself.

This development which is going on in the law was brought to the attention of all some years ago by a striking decision handed down by the United States Supreme Court in regard to the coal roads—*New York, New Haven & Hartford Railroad v. Interstate Commerce Commission*.⁵¹ The complaint in that case was filed by the attorney-general under the provisions of the Interstate Commerce Act, which forbid personal discrimination, charging that traffic was being moved at less than the published rates. It was shown that the Chesapeake and Ohio Railroad had sold to the New York, New Haven and Hartford Railroad sixty thousand tons of coal to be delivered to the buyer at \$2.75 per ton; and it was averred that the price of the coal at the mines where the Chesapeake and Ohio bought it and the cost of transportation from Newport News to Connecticut would aggregate \$2.47 per ton, thus leaving to the Chesapeake and Ohio only about twenty-eight cents a ton for carrying the coal from the Kanawha district to Newport News, whilst the published tariff for like carriage from the same district was \$1.45 per ton. Upon these facts the United States Supreme Court decided that there was in effect the evil of personal discrimination against other shippers in this arrangement; and the final decree, therefore, was that the Chesapeake and Ohio was perpetually enjoined from taking less than its published tariff of freight rates, by means of dealing in the purchase and sale of coal.⁵²

⁴⁹ *Rogers Locomotive & Machine W. v. Erie R. R.*, 20 N. J. Eq. 379.

⁵⁰ See *Johnson v. Dominion Exp. Co.*, 28 Ontario Rep. 203.

⁵¹ 200 U. S. 361, 26 Sup. Ct. 272.

⁵² Whether express companies are discriminating in favor of themselves in transporting money. *American*

§§ 920, 921] RAILROAD RATE REGULATION

Topic B. Provision of Reasonable Facilities

§ 920. Not required by original Act.

The original Interstate Commerce Act did not require or give the Commission power to require that carriers should furnish reasonable facilities; though it did forbid any discrimination in furnishing facilities. The common law required the furnishing of such facilities; but since the Act was silent, the Commission could not require a carrier to furnish cars.⁵³ Nor could it require a railroad to furnish refrigerator cars for the carriage of fruit.⁵⁴ So it would not order a railroad to deliver carload freight in bulk to a connecting road.⁵⁵ Nor was a railroad under the Act obliged to allow a steamboat access to its wharf.⁵⁶ In the same way under the original Act a railroad was not bound to provide and maintain a spur track to the premises of a shipper.⁵⁷ And carriers were allowed to make their timetables and train service without dictation.⁵⁸

§ 921. Orders concerning freight delivery.

Although railroad service does not commonly contemplate delivery to the premises of the consignee by wagon, if the custom has prevailed the Commission will now order store delivery under its present powers.⁵⁹ But carriers were not required to resume delivery of melons at a certain pier in New York, conditions justifying a change of the place of delivery from New York to Jersey

Bankers' Ass'n v. American Express Co., 15 I. C. C. 15.

⁵³ Scofield v. Lake Shore & M. S. Ry., 2 Int. Com. Rep. 67, 2 I. C. C. 90; Rice v. Cincinnati, W. & B. R. R., 3 Int. Com. Rep. 841, 5 I. C. C. 193.

⁵⁴ Re Transportation & Refrigeration of Fruit, 10 I. C. C. Rep. 360.

⁵⁵ Railroad Comrs. v. Louisville & N. R. R., 10 I. C. C. Rep. 173.

⁵⁶ Ilwaco Ry. & Nav. Co. v. Ore-

gon S. L. & U. N. Ry., 57 Fed. 673, 6 C. C. A. 495, 5 Int. Com. Rep. 627.

⁵⁷ Mt. Vernon Milling Co. v. Chicago, M. & S. P. Ry., 7 I. C. C. Rep. 194; Red Rock Fuel Co. v. Baltimore & O. R. R., 11 I. C. C. Rep. 438.

⁵⁸ Loch Lynn Construction Co. v. Baltimore & O. R. R., 17 I. C. C. 396.

⁵⁹ Wholesale Fruit & P. Ass'n v. Atchison, T. & S. F. Ry., 14 I. C. C. 4.

City.⁶⁰ Merchants of Washington, D. C., located on Fourteenth street, northwest, between Florida avenue and Park road, are subjected to undue prejudice by being compelled to pay a drayage charge on less-than-carload freight shipments, while merchants located in Georgetown are given free pick-up and delivery service.⁶¹ In the express business on the other hand, personal delivery to the consignee is the normal service. The Commission has laid it down that there should be definite rules concerning delivery of express traffic; and when free delivery is made, the free delivery limits must be plainly indicated, this information being made public in the express tariffs and in the express directory.⁶²

§ 922. Contracts with grain elevators.

As to grain elevators the rule is practically established that the railroad must deliver at their private siding to all of them that are along its route. Grain in bulk is a peculiar kind of freight, which as a commercial matter requires special delivery. And as this is a duty owed by the railroad to its patrons, it would not be legal for it to make a discrimination in favor of one grain elevator requiring its patrons to receive grain consigned to them through it and pay to its proprietor his fixed charge.⁶³ Against such a possibility more than one court has urgently protested. "May such railroad companies, in like manner, discriminate between grain elevators in the same place,—constitute one elevator its depot for the delivery of grain, and force competing interests to receive from and transfer the grain consigned to them through such selected and favored channel? If railroad corporations possess such right, they can destroy a refractory manufacturer, exterminate, or very materially cripple competition."⁶⁴

⁶⁰ *Bahrenburg Bros. & Co. v. A. C. L. R. R.*, 24 I. C. C. 561.

⁶¹ *Casassa v. P. R. R.*, 24 I. C. C. 629.

⁶² *In re Express Rates*, 24 I. C. C. 380.

⁶³ *Chicago & Northwestern Ry. Co. v. People of Illinois*, 56 Ill. 365.

⁶⁴ See also *Roby v. State ex rel.*, 76 Neb. 450, 107 N. W. 766.

§ 923. Arrangements with stockyards.

The relative positions of the railroads and the stockyards will be discussed later at greater length. It will then be seen that although the decision at first was otherwise it now seems to be held that there is no duty owed to the owner of cattle to make special delivery of them at any place along the line that he wishes. Consequently it is held that the railroad may designate certain points of delivery reasonably convenient, as it may of other freight which it has undertaken to carry. Upon this basis the courts have been willing to permit the railroad to designate one of several stockyards as its cattle station in effect, where it will deliver cattle consigned to that point and have accordingly justified it in refusing to deliver at other stockyards. This was well enough so long as the courts held strictly as they once did⁶⁴ that no charge could be made under such circumstances against the shipments for yardage if the consignee was ready to take the cattle away. But under the latest decisions the courts have permitted the stockyards company to make an additional charge, considering it to be a connecting service.⁶⁵ It would seem, therefore, that there is danger in the present situation that the railroad will not fulfill its duty.

§ 924. Service at private sidings.

Generally speaking at common law one who has freight to ship must bring it to the established freight stations. No matter how large the business of a particular shipper may be, the doctrine of the courts was that he could not

⁶⁴ Covington S. Y. Co. v. Keith, 139 U. S. 128, 35 L. ed. 73, 11 Sup. Ct. 461. See also Butchers' & D. S. Y. Co. v. Louisville & N. R. R. Co., 67 Fed. 35, 14 C. C. A. 290. Coe v. Louisville & N. R. R. Co., 3 Fed. 775, is practically overruled on this point.

⁶⁵ Interstate Com. Comm. v. Chicago, B. & Q. R. R. Co., 186 U. S. 320, 46 L. ed. 1182, 22 Sup. Ct. 824. See also Central S. Y. Co. v. Louisville & N. R. R. Co., 192 U. S. 568, 48 L. ed. 565, 24 Sup. Ct. 339. See further Louisville & N. R. R. Co. v. Central S. Y. Co., 212 U. S. 132, 53 L. ed. 441, 29 Sup. Ct. 246.

insist upon having cars handled from his private switch.⁶⁶ And certainly in any particular case the rights of the railroad are so far paramount that a showing that the operation of a switch connection might be dangerous will be fatal to the application. There were extreme cases, where even at common law it would be unreasonable to enforce this usual regulation that all must bring their freight to the stations. For peculiar shipments, such as coal and ore, grain and oil—to give four examples⁶⁷—special acceptance along the tracks at private sidings has always been regarded as so necessary in the case of such bulky freight as to distinguish the case from that of package freight.

§ 925. Installing switches now under the Act.

The duty of providing switching privileges was placed upon railroads in England in 1904 and almost directly thereafter was imposed in the United States by the provisions of the Act of 1906. Under these provisions as they originally read authorizing the Commission to order a main line to establish in proper cases a switch connection with a branch line, the Supreme Court⁶⁸ held that the application could only be made by a shipper and not by a carrier, it not being the intention of the legislature to give a roving commission to every road that might see fit to make a descent upon a main line. This wording of the Act was changed in 1910 so as to give the lateral road a chance to apply for a connecting switch; but the Supreme Court⁶⁹ has thereupon held that the line must be truly a

⁶⁶ See *Jones v. Newport N. & M. V. R. R.*, 65 Fed. 736, 31 U. S. App. 92, 13 C. C. A. 95; also *Mercantile Trust Co. v. Columbus S. & H. R. R.*, 90 Fed. 148, and *Industrial Siding Case*, 140 N. C. 239, 52 S. E. 941.

⁶⁷ See *Harp v. Choctaw, O. & G. R. R.*, 125 Fed. 445, 61 C. C. C. 405; also *Olanda Coal M. Co. v. Beech*

Creek R. R., 144 Fed. 150, and *Chicago & N. W. Ry. v. People*, 56 Ill. 365.

⁶⁸ *Interstate Commerce Commission v. Delaware, L. & W. R. R. Co.*, 216 U. S. 531, 54 L. ed. 605, 30 Sup. Ct. 415.

⁶⁹ *United States v. Baltimore & O. S. W. Ry.*, 226 U. S. 14, 33 Sup. Ct. 5.

lateral one, not a competing line in part parallel. It has been held in a State court that a railroad company may still enter into an agreement as to the terms and conditions upon which a spur track for a private customer shall be installed, unless they do in fact involve or contemplate some discrimination against other persons seeking or enjoying like privileges.⁷⁰ The power of the Commission to require switch connection is not founded upon any contractual relationship existing between carriers and those entitled to invoke the benefit of the statute; and the Commission is without jurisdiction to compel defendants to specifically perform a contract in respect thereto or to award damages for the breach thereof.⁷¹

§ 926. Basis for ordering switch connection.

Under the Act the safety of main-line traffic must be considered in locating switches.⁷² And the Commission realizes that the carrier should be left a range of discretion in locating a side track.⁷³ It should be noted that the Commission has no authority to order construction of side tracks, only switch connection.⁷⁴ Therefore, the carrier can demand an advancement by the shipper before it will undertake to build a switch.⁷⁵ In various cases the Commission has found that the record presents no state of facts upon which Commission may order connection with complainant's plant.⁷⁶ And unless there is reason enough for switch connection in the traffic offered, no order will be made.⁷⁷ But a shipper has a right to ask for a switch even if he has another outlet for his traffic by another

⁷⁰ Cedar Rapids G. & E. Light Co. v. Chicago, R. I. & P. Ry. Co., 145 Ia. 528, 124 N. W. 323.

⁷¹ Ralston Townsite Co. v. M. P. Ry. Co., 22 I. C. C. 354.

⁷² Reiter, Curtis & Hill v. N. Y. S. & W. R. R., 19 I. C. C. 290.

⁷³ Weleetka L. & W. Co. v. Ft. S. & W. R., 12 I. C. C. 503.

⁷⁴ Winters Paint Co. v. Chicago, M. & St. P., 16 I. C. C. 587.

⁷⁵ McRae Terminal R. Co. v. Southern Ry., 12 I. C. C. 545.

⁷⁶ Consolidated Pump Co. v. L. S. & M. S. Ry., 27 I. C. C. 519.

⁷⁷ Cormick v. Chicago, B. & Q. R. R., 14 I. C. C. 611.

railroad.⁷⁸ Switch connections may be ordered between rail lines and the docks of a steamship company; and the powers of the Commission in this respect have been made more ample by recent legislation.⁷⁹ And generally speaking the Commission is not unmindful of the importance of enabling shippers to have goods loaded at any point without necessity of hauling them to a station.⁸⁰

§ 927. Any discriminatory treatment forbidden.

It may or may not be undue prejudice to refuse spur service to particular mine.⁸¹ Because a spur track is included in service of one carrier it does not follow that service of another carrier without a spur track is inadequate.⁸² But where a switch is in, discrimination results from a refusal to deliver livestock shipments to complainant's side track.⁸³ It is not clearly a discrimination, but more in nature of a tort, for a carrier to close shipper's switch and refuse to place cars thereon.⁸⁴ This is well explained in the case,⁸⁵ where the Supreme Court squarely held that a railroad might enter into a traffic agreement with one railroad connecting with it, involving through billing at a joint rate, and at the same time refuse to enter into a similar agreement with another railroad, traversing the same territory as the first and having the same terminus. The court went so far in another case as to say that an interstate carrier which enters into an arrangement with a connecting carrier for through billing, rating, and loading and for the use of its tracks and terminals, is not obliged to make the same arrangements with other

⁷⁸ *Railway & D., L. & W. Ry.*, 14 I. C. C. 191.

⁷⁹ *In re Wharfage Facilities at Pensacola*, 27 I. C. C. 252.

⁸⁰ *May Bros. v. Y. & M. V. R. R.*, 26 I. C. C. 323.

⁸¹ *Chicago W. & V. Coal Co. v. C., B. & Q. R. R.*, 23 I. C. C. 13.

⁸² *Southern California Sugar Co.*

v. S. P. L. A. & S. L. R. R., 19 I. C. C. 11.

⁸³ *Baltimore Butchers' Live Stock Co. v. O. B. & W. R. R.*, 20 I. C. C. 124.

⁸⁴ *Hillsdale Coal & Coke Co. v. P. R. R.*, 19 I. C. C. 356.

⁸⁵ *Atchison, T. & S. F. Ry. v. Denver & N. O. R. R.*, 110 U. S. 667, 28 L. ed. 291, 4 Sup. Ct. 185.

connecting carriers, though the physical facilities for an interchange of traffic are the same.⁸⁶

§ 928. Establishment of stations.

It is everywhere agreed that the State may by statute establish stations at places where the public need requires them. Where a station was ordered in a place where it was obvious there was practically no business whatsoever nor any prospect of any being developed the court set the statute aside.⁸⁷ By the progressive view of this question the courts are held to have general jurisdiction to compel a railroad to establish stations in reasonable places.⁸⁸ In the leading case in Illinois, the court without aid of special legislation itself ordered the opening of a station for a community of 1800 inhabitants, through which a railroad was running without stopping.⁸⁹ In a more extreme case still in New Hampshire the court ordered two railroads to join in the construction of a union station.⁹⁰ Speaking generally wherever there is a community which has business enough to make the establishment of the station plainly profitable, there can be no doubt that the railroad is acting unreasonably in not establishing a station there at once. Assuming the Commission to have power to require a common carrier to locate or relocate and maintain a station at a given point, such power should not be exercised unless all the facts and conditions clearly indicate that the interests of the general public in the locality involved are materially impaired by the lack of such facilities.⁹¹ It has been said by the Commission that aside from the question of its authority to order restoration of stations, that none was needed in the cases as

⁸⁶ Little Rock & M. R. Co. v. St. Louis S. W., 63 Fed. 775.

⁸⁷ Louisville & N. Ry. Co. v. State, 91 Ark. 358, 121 S. W. 284.

⁸⁸ Florida, C. & P. R. R. Co. v. State ex rel., 31 Fla. 482, 13 So. 103.

⁸⁹ People v. Chicago & A. R. R., 130 Ill. 175, 22 N. E. 857.

⁹⁰ Concord & M. R. R. Co. v. Boston & M. R. R., 67 N. H. 464.

⁹¹ Jones v. St. L. & S. F. R., 12 I. C. C. 14.

yet brought before it.⁹² The exact location of express offices is not within the jurisdiction of Commission if the public is being served adequately.⁹³ But an order was recently made that respondents should provide a receiving depot for oysters in the section of city where complainants were located.⁹⁴

§ 929. Protection of its terminals.

Pursuant to the proviso of the Act the Commission has several times had occasion to say that it had no authority to require one railroad to give the use of its terminal facilities to another. The language is explicit to the effect that railroads cannot be required to open their terminals to traffic brought to or carried from that locality by their competitors.⁹⁵ On the other hand, if carriers offer each to the other the use of their respective tracks or terminals, as is shown by the fact that freight is actually interchanged after its arrival at the terminal, and for this service charges are provided in tariffs published and filed, it follows that, having elected to perform this service, the charges therefor must be reasonable.⁹⁶ And, as a shipper has a right to have carload property transported from and to interstate points at through rates, transporting cars to or from complainant's terminal is not giving use of its tracks and terminal facilities within meaning of third section.⁹⁷ The mere fact that the plaintiff is at great disadvantage in its business, because it could not get similar treatment, is not enough to move the court to feel that there had been any illegal discrimination; the question is whether the company is giving proper service over its own lines for business offered.⁹⁸

⁹² *Snook v. Central R. R. of N. C.*, 17 I. C. C. 375.

⁹³ *American Bankers' Ass'n v. American Express Co.*, 15 I. C. C. 15.

⁹⁴ *Atlantic Packing Co. v. Am. Exp. Co.*, 28 I. C. C. 244.

⁹⁵ *Morris Iron Co. v. B. & O. R. R.*, 26 I. C. C. R. 240.

⁹⁶ *Merchants' & M'fg Ass'n v. Penn. R. R.*, 23 I. C. C. 474.

⁹⁷ *Peoria Terminal Case*, 26 I. C. C. 226.

⁹⁸ *Pittsburg Switching Case*, 28 I. C. C. 621.

Topic C. Supply of Equipment

§ 930. Basis of the duty to supply equipment.

It must be obvious that the provision of adequate facilities in the conduct of the business which has been undertaken is one of the fundamental obligations resting upon those who undertake a public service; for without the recognition of this duty to take reasonable steps to provide proper facilities the general requirement of service would be idle.⁹⁹ To apply this rule to the transportation of freight, the carrier performs his public duty only by providing reasonably for the normal fluctuations in offerings of freight. "The sufficiency of such accommodations must be determined by the amount of freight and the number of passengers ordinarily transported on any given line of road. The duty of a company to the public, in this respect, is not peculiar to any season of the year, or to any particular emergency that may possibly arise in the course of its business. The amount of business ordinarily done by the road is the only proper measure of its obligation to furnish transportation. If by reason of a sudden and unusual demand for stock or produce in the market, or from any other cause, there should be an unexpected influx of business to the road, this obligation will be fully met by shipping such stock or produce in the order and priority of time in which it is offered."¹

§ 931. Commission jurisdiction over facilities.

Car furnishing is part of transportation under the Act

⁹⁹ Southern Ry. Co. v. Atlanta Sand & S. Co. (Ga.), 68 S. E. 807.

A carrier is liable in an action at law for refusing to furnish cars for the shipment of cross-ties while at the same time furnishing cars to others for the interstate shipment of other freight. American Tie & Timber Co. v. K. C. S. Ry. Co., 175 Fed. 28.

¹ Fagg, J., in Ballentine v. North Mo. R. R. Co., 40 Mo. 491, 93 Am. Dec. 315.

The provision of cars and the distribution thereof is dependent upon what seemed to be and now is reasonable and proper under all the circumstances and conditions. People ex rel v. St. L. A. & T. H. R. R., 176 Ill. 512, 52 N. E. 292, 35 L. R. A. 656.

as amended; and the Commission has full jurisdiction to see that a railroad provides transportation as therein defined upon reasonable terms and without discrimination.² But where there is no discrimination shown the Commission formerly declined to require a carrier to furnish a car shed under which perishable freight might be loaded without damage from the weather, or to furnish cars in proper repair, clean, dry, and in suitable condition for carrying produce.³ The Act now lays upon the carriers the duty to provide transportation facilities.⁴ In a late proceeding the complainant's prayer for the restoration of the sleeping-car service formerly maintained by defendants between certain points was dismissed, but the question of jurisdiction was not decided.⁵ Under the present extension of its powers, however, there is no doubt of the duty of carriers under the Act to furnish cars suitable for transportation.⁶ And the Commission has recently held that it is the obligation of carriers engaged in that traffic to furnish adequate number of cars for the handling at Galveston of export cotton.⁷

§ 932. The obligation treated reasonably.

When adequate provision is made for usual business, it can hardly be said that the carrier has not fulfilled his duty. The general principle is well stated in its application to a particular case in an early proceeding before the Commission, under section 3: "The vast fluctuations and unforeseen developments of commerce, or the fault or misfortune of some one or more connecting lines, may occasionally bring about a condition of affairs in which the best managed railroad, and with the most ample

² *Arlington Heights Fruit Exchange v. S. P. Co.*, 20 I. C. C. 106.

³ *Ponchatoula Farmers' Ass'n v. I. C. R. R.*, 19 I. C. C. 513.

⁴ *Coal Rates on Stony Fork Branch*, 26 I. C. C. 186.

⁵ *Corporation Commission of Okla-*

homa v. A., T. & S. F. Ry., 25 I. C. C. 120.

⁶ *Southwestern Missouri Millers' Club v. St. L. & S. F. R. R.*, 26 I. C. C. 245.

⁷ *Galveston Commercial Ass'n v. A., T. & S. F. Ry.*, 25 I. C. C. 216.

freight equipment, is unable to move at once as promptly as tendered all the freight upon its line, and this without any fault of its own. It certainly is the duty of every railroad company to provide itself with a sufficient freight equipment and to keep this well in hand for the prompt movement of freight over its line, based upon known and probable estimates of the business of a season."⁸

§ 933. Provision of special equipment.

In a diversified business, such as common carriage, a special equipment of various sorts must often be provided. In the case of the railroads very different cars of course are requisite for the transfer of passengers and of freight. And although many kinds of freight may be transported in open cars with safety, more kinds require box cars. But in the conduct of a modern railroad far more facilities than these simpler forms have been found to be necessary. Thus for the transportation of many perishable food stuffs, such as butter and fruit, refrigerator cars have been found to be indispensable; and it is generally held in modern cases that these improved cars are imperatively demanded for the proper transportation of perishable articles.⁹ The same law, by reason of the same necessity, applies to the provision of ventilator cars for those commodities which would be injured by transportation in closed cars.¹⁰ As soon as the railways begin the transportation of livestock upon a large scale, as part of their regular business, the provision of special stock cars becomes necessary.¹¹ And

⁸ Riddle, Dean & Co. v. Pittsburgh & L. E. Ry., 1 Int. Com. Rep. 689.

Generally speaking, freight cars should be made to fit the business; but within reasonable limits business may be required to adapt itself to the car. Western Classification Case, 25 I. C. C. 442.

⁹ St. Louis, I. M. & S. Ry. v. Renfro, 82 Ark. 143, 100 S. W. 889, 10 L. R. A. (N. S.) 317.

¹⁰ Forrester v. Southern Ry. Co., 147 N. C. 553, 18 L. R. A. (N. S.) 508, 61 S. E. 524.

It is the duty of the carrier to furnish necessary equipment for the movement of the potato traffic from Maine to New England. In re Advances on Potatoes, 25 I. C. C. 159.

¹¹ Di Giorgio I. & S. S. Co. v. Pennsylvania R. R. Co., 104 Md.

so where a railroad runs through a district shipping large quantities of oil it should, it seems, equip itself with tank cars to meet the commercial necessity of shipment in bulk.¹² These cases would seem to justify the generalization that wherever the territory served by the railroad produces in sufficient quantities commodities which require special equipment for their proper shipment such equipment should be provided.

§ 934. Demand foreseen although unusual.

If, then, the abnormal demand should have been foreseen by a reasonable management, it is in default unless it has made every effort to meet the emergency. Thus in the conduct of passenger business, when it is known that some exhibition or other event will bring together a large number of people, the transportation lines should make seasonable allotment of facilities to meet the extraordinary demand at this point.¹³ But if the number of passengers applying is unprecedentedly large the railroad is of course excused, if it has provided as much additional service as would seem to be necessary at such a time.¹⁴ A recent case goes so far as to hold that if a railroad had not provided sufficient equipment to move the cotton crop each recurring season, a plea in its defense that in the particular season the crop was above average will not save it.¹⁵ And in a still later case it was held that a railroad com-

693, 65 Atl. 425, 8 L. R. A. (N. S.) 108.

¹² *Western N. Y. & P. Ry. Co. v. Penna. Ry.*, 137 Fed. 343, 70 C. C. A. 23.

Where special preparation is required to fit the car for shipment of particular commodity, task devolves upon shipper. *Southwestern Missouri Millers' Club v. St. L. & S. F. R. R. Co.*, 26 I. C. C. 245.

¹³ *Chicago & A. Ry. Co. v. Dummer*, 161 Ill. 190, 43 N. E. 698.

¹⁴ *Gordon v. Manchester & L. R. R. Co.*, 52 N. H. 596, 13 Am. Rep. 97.

In one important investigation, proposed remedies for car shortage were considered, such as curtailment of reconsignment privileges; restricting warehousing in cars; car clearing-house; increasing car rental; reciprocal car demurrage. In the *Matter of Car Shortage*, 12 I. C. C. 561.

¹⁵ *Yazoo & M. V. R. R. Co. v. Blum Co.*, 88 Miss. 180, 40 So. 748, 10 L. R. A. (N. S.) 432.

pany which had obligated itself to furnish refrigerator cars to transport garden truck to market cannot escape liability for breach of that duty upon the ground that the crop was unusually large, if it was no larger than might reasonably have been expected from the acreage planted, knowledge of which the railroad company either had, or had the means of obtaining.¹⁶

§ 935. Reasonable time to increase facilities.

When it is said that the company is responsible for not meeting an increase in demand which has been foreseen, this is subject to the qualification that the company shall be given a reasonable time after it should have anticipated the future demands to equip itself for them. And it must be recognized that this is often a matter of considerable time. It is a long time after orders for railroad equipment have been placed before rolling stock, particularly locomotives, is delivered.¹⁷ Sheer physical impossibility need not be shown; commercial impracticability is enough. Doubtless a granger railroad has at every harvest time more demand for grain cars than it can instantly supply. But to buy sufficient cars to meet every demand the very day it is made, would leave perhaps idle during the year ten times the number of cars that the average business demands. This would inevitably react upon the freight rate, increasing it to a unbearable extent. If the manage-

¹⁶ *Atlantic C. L. Ry. v. Geraty*, 166 Fed. 10, 91 C. C. A. 602, 20 L. R. A. (N. S.) 310.

Carriers who hold themselves out as prepared to furnish cars of various sizes and apply charges based upon the size of the car, confer upon the shipper a legal right to demand a car of certain size. *Riverside Mills v. G. R. R.*, 25 I. C. C. 434.

¹⁷ See to this effect: *St. Louis S. W. Ry. Co. v. Clay Ginn. Co.*, 77 Ark. 357, 92 S. W. 531; *Mauldin v.*

Seaboard Air Line Ry. Co., 73 S. C. 9, 52 S. E. 677.

It is not reasonable that carriers unable to supply shippers with sufficient cars of large or average capacity should make such minimum loading requirements as cannot be practically complied with as to the smaller cars in order that they may obtain as much earnings from shipments therein as from those in the larger and superior cars. *Wierner & Rich v. C. N. W. Ry. Co.*, 12 I. C. C. 462.

ment of such a railway provides sufficient cars to move the crop within reasonable time to meet the market, it would seem that it is doing all that should be required.¹⁸

§ 936. Carriage through in same cars.

Whether a railroad is compelled by its duty to afford reasonable facilities for interchange of traffic to receive a carload of freight from a connecting road and carry it through without breaking bulk was once not clear.¹⁹ It was early held, however, that a boycotted road could compel a connecting road to do so, in spite of a threatened strike of its employees.²⁰ In another case at about the same time²¹ it was held that through car service could not be asked. In *Little Rock Railroad v. St. Louis Southwestern Railway*²² it was broadly said, "The third section of the Interstate Commerce Act does not require an interstate carrier to receive freight in the cars in which it is tendered by a connecting carrier, and to transport it in such cars, paying a mileage rate thereon, when it has cars of its own that are available for the service, and the freight will not be injured by transfer." But a railroad may well profess to furnish cars for service beyond its route, as was said in *St. Louis S. W. Ry. v. State*.²³ "For one railroad company to be an Ishmaelite among its associates would operate disastrously to its shippers. The shippers of Arkansas expect the public carriers to put their cotton to the spinners in New England and their fruits to the North, and their lumber and

¹⁸ See to this effect: *State ex rel. v. Chicago, B. & Q. R. R. Co.*, 71 Neb. 593, 99 N. W. 309, and *State ex rel. v. Chicago, B. & Q. R. R. Co.*, 72 Neb. 542, 101 N. W. 323.

Carrier should not be required to accept a carload of miscellaneous freight from another without checking contents. *Dubuque Shippers' Ass'n v. C. & N. W. Ry. Co.*, 26 I. C. C. 565.

¹⁹ See *Michigan C. R. R. v. Smithson*, 45 Mich. 212, 7 N. W. 791.

²⁰ In *Chicago, B. & Q. R. R. v. Burlington, C. R. & N. Ry.*, 34 Fed. 481.

²¹ *Oregon S. L. v. N. P. Ry.*, 51 Fed. 465.

²² 63 Fed. 775, 11 C. C. A. 417.

²³ 85 Ark. 311, 107 S. W. 1180.

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coal to the four quarters of the Union, without change from consignor to consignee."

§ 937. Provision of cars in through service.

A railroad by the common law certainly is not bound to send its cars beyond its own rails;²⁴ and no legislation has as yet been devised which can constitutionally compel it to do so.²⁵ On the other hand, a railroad may legally enter into a through route, or contract for through shipments; and then in either case it will be obliged to let all patrons who may desire ship through in the original cars.²⁶ It is plainly the duty of a connecting carrier on a joint through rate to take the goods through in the cars delivered to it by the initial carrier if this is required.²⁷ Each carrier subject to Act is charged with the duty of furnishings cars to industries located upon its lines; in case of through routes the obligation to furnish cars for shipments to points upon the lines of its connections is joint with such connections.²⁸ It follows in the opinion of the Commission that it is the initial carrier which must in first instance assume the burden of furnishing the equipment necessary for taking the goods through to destination if moving in carload lots.²⁹

Topic D. Distribution of Equipment

§ 938. Discrimination in use of cars.

If there is a shortage of cars due to unusual press of business, the carrier must supply his cars ratably as far as they go; and if he makes a reasonable distribution no

²⁴ St. Louis South-Western Ry. Co. v. State, 85 Ark. 311, 107 S. W. 1180, 122 Am. St. Rep. 33.

²⁵ Louisville & N. R. R. Co. v. Central S. Y. Co., 212 U. S. 132, 143, 53 L. ed. 441, 29 Sup. Ct. 246.

²⁶ St. Louis S. W. Ry. Co. v. Phoenix Cotton Oil Co., 88 Ark. 594, 115 S. W. 393.

²⁷ Pennsylvania Refining Co. v. Western N. Y. & P. R. R. Co., 208 U. S. 208, 52 L. ed. 456, 28 Sup. Ct. 268.

²⁸ Huerfano Coal Co. v. C. & S. E. R. R., 28 I. C. C. 502.

²⁹ Proportional Rates on Excelsior and Excelsior Wrappers, 26 I. C. C. 44.

one can complain of discrimination.³⁰ Regular customers are not entitled to preference over occasional ones under such circumstances;³¹ and it may be a carrier can refuse to allow cars to be sent off its line to distant points.³² Undue preference may result from coal-car distribution rules; the shipper is entitled not only to receive fair proportion and use of carrier's equipment, but may protest against a competitor's being given a supply of cars in excess of his just proportion.³³ A carrier should arrange for car distribution on a basis which will not result in unlawful discrimination between the various operators in the field.³⁴ The rights and duties of these various carriers in the apportionment of available car supply must be determined from the Act and not from any contract which they may choose to make.³⁵ Operators may not be able to secure a percentage of the available cars from both roads during periods of car shortage, but will be given the highest percentage of cars that either of the carriers can supply at that time.³⁶ A carrier cannot give a shipper a preference in car distribution in order that it may profit thereby; neither can it give the shipper a preference in order that the shipper may profit thereby, and, when called upon by any individual shipper for full service, the only defense which the carrier can interpose is that the supply which it has furnished is sufficient for normal demands, and that in times of stress it has fairly and impartially prorated all of its car equipment.³⁷

³⁰ *United States v. West Virginia N. R. R.*, 125 Fed. 252; *S. S. Daish & Sons v. Cleveland, A. & C. Ry.*, 9 I. C. C. Rep. 513; *Riddle v. Baltimore & O. R. R.*, 1 Int. Com. Rep. 778, 1 I. C. C. 372.

³¹ *Riddle v. New York, L. E. & W. Ry.*, 1 Int. Com. Rep. 787, 1 I. C. C. 594.

³² *Riddle v. Pittsburg & L. E. R. R.*, 1 Int. Com. Rep. 688, 1 I. C. C. 374.

³³ *Bullah Coal Co. v. P. R. R.*, 20 I. C. C. R. 52.

³⁴ *Powhatan Coal & Coke Co. v. N. & W. Ry.*, 13 I. C. C. 69.

³⁵ *Huerfano Coal Co. v. C. & S. E. R. R.*, 26 I. C. C. 502.

³⁶ *Coal Rates on Stony Fork Branch*, 26 I. C. C. 168.

³⁷ *United States v. B. & O. R. Co.*, 165 Fed. 113.

§ 939. Jurisdiction of the Commission.

It is the duty of railroad companies to provide suitable vehicles of transportation and to offer their use impartially to all shippers, and unjust discrimination through car distribution is prohibited by the Act.³⁸ Section 15 of the Act is to be read in the widest possible sense; it brings within the jurisdiction of the Commission all the regulations and practices of carriers under which they offer their services to the shipping public, and conduct their transportation.³⁹ Rules or regulations prescribing who shall load and unload cars of freight are rules or regulations affecting rates, and are therefore subject to the control of the Commission under this section.⁴⁰ Where the shipper has shown in a mandamus suit to compel equitable car distribution, that the carrier has not supplied the facilities demanded, the burden is upon the carrier, in order to exonerate itself from the charge of undue preference, to show that it is prorating its cars fairly and equally among all the operators who are similarly situated and engaged in transporting freight over its lines.⁴¹ Where a shipper seeks damages arising from an alleged improper and discriminatory system of car distribution applying to a certain coal mining region, and affecting the interests of many shippers, he cannot institute an original suit for the same in a United States court under section 9 of the Act, but must first file complaint with the Commission.⁴² The Commission under section 15 of the Act has authority to prohibit unjust discrimination in the distribution of cars by making orders which must be obeyed for a period of two years.⁴³ The Commission thus has jurisdiction to consider the question of car distribution, and to determine

³⁸ *Powhatan Coal & Coke Co. v. N. & W. Ry. Co.*, 13 I. C. C. 69.

³⁹ *Rail & River Coal Co. v. B. & O. R. R. Co.*, 14 I. C. C. 86.

⁴⁰ *Wholesale Fruit & Product Association v. A., T. & S. F. Ry. Co.*, 14 I. C. C. 410.

⁴¹ *United States v. B. & O. R. R. Co.*, 165 Fed. 113.

⁴² *Morrisdale Coal Co. v. Pennsylvania R. Co.*, 176 Fed. 748.

⁴³ *Interstate Commerce Commission v. Ill. Cent. R. R.*, 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. 155.

how many each of respondents must furnish.⁴⁴ And the basis of car distribution is regarded as a regulation affecting rates within meaning of section 15.⁴⁵ So mine rating is a practice in connection with the movement of interstate traffic which is within the jurisdiction of the Commission.⁴⁶

§ 940. Order of preference between shippers.

It is the duty of the carrier to accommodate the needs and necessities of shippers in regard to supplying cars; as a practical matter it is not possible for carriers to furnish all shippers with just such cars as they would like and in such numbers at such days and hours as would best serve their interests.⁴⁷ If all shippers cannot be served where there are a certain number of cars apportioned to a given station, the inclination perhaps is to call it discrimination unless they are served in the order of application. But this is not necessarily the rule; indeed it would be more in the interests of all concerned if the available supply at a given time are distributed ratably according to some fair basis of prorating. The rule of apportioning cars in times of great scarcity by giving the first car to the first shipper ordering and the second to the next shipper ordering, may seem just. On the other hand, with a considerable, but still scarce, car supply, and a shipper, like complainant, having a large quantity to ship, while others may have but an occasional carload, rigid adherence to such a rule might prove decidedly unjust.⁴⁸ It is fundamental to-day that shippers are entitled not only to fair use of facilities but to assurance that no one fares ratably better.⁴⁹ And as the Commission has pointed out, as it is the plain duty of carriers to distribute cars equitably,

⁴⁴ *Coal Rates on the Stony Fork Branch*, 26 I. C. C. 168.

⁴⁵ *Hillsdale Coal & Coke Co. v. P. R. R.*, 19 I. C. C. 358.

⁴⁶ *In re Mine Ratings*, 25 I. C. C. 286.

⁴⁷ *American Creosoting Works v. Ill. Cent. R. R. Co.*, 15 I. C. C. 160.

⁴⁸ *Richmond E. Co. v. P. M. Ry.*, 10 I. C. C. 629.

⁴⁹ *Hillsdale Coal & Coke Co. v. P. R. R.*, 19 I. C. C. 358.

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they should hire a sufficient number of men to facilitate the distribution.⁵⁰

§ 941. Where no preference justifiable.

It would be a safe generalization, however, that no preference is justifiable between goods of the same nature if the conditions surrounding the movement of the traffic are the same. The common carrier has no right to select either goods or customers. However it has been held that a carrier may make arbitrary allotment of cars for the purpose of enabling the owner of a mine reasonably to develop it, so as to put it in a condition to operate and make shipment.⁵¹ And there is no discrimination against localities by an arrangement among carriers dividing the traffic of transporting immigrants from Atlantic ports westward in agreed proportions, where the immigrants are transported at domestic published rates.⁵² In the past there have been great injustices in the apportionment of coal cars in times of car shortage by reason of such apportionment without regard to any general rule.⁵³ Carriers should apportion cars upon bases ascertained in advance, and take into account not only physical capacity of each mine to make shipments, but also the commercial capacity of each mine to find a market for its coal. No discrimination is shown against a shipper whose commercial misfortunes have operated to reduce their ratings.⁵⁴ Where unjust discrimination is found to have existed in the past, the carriers will be given time within which to formulate proper rules and regulations governing mine rating and car distribution.⁵⁵

§ 942. Basis of prorating cars.

It seems now well established, therefore, that it is the

⁵⁰ Colorado Coal Traffic Ass'n v. D. & R. G. R. Co., 23 I. C. C. R. 458.

⁵¹ Rail & River Coal Co. v. B. & O. R. R., 14 I. C. C. 86.

⁵² Re Transportation of Immigrants from New York, 10 I. C. C. Rep. 13.

⁵³ National Coal Co. v. B. & O. R. R., 28 I. C. C. 442.

⁵⁴ Id., 28 I. C. C. 442.

⁵⁵ Colorado Coal Traffic Ass'n v. D. & R. G. R. R., 23 I. C. C. R. 458.

duty of the management when the supply is short to prorate cars apportioned to the station among the applicants. The law has become quite elaborate in late years as to the various elements that may enter into the consideration as to what is a fair apportionment. Thus in a recent case⁵⁶ it was said in apportioning cars that in reaching a proper basis for the distribution of railroad cars it is necessary that an impartial and intelligent study of the capacity of the different mines be made by competent and disinterested experts, whose duty it should be to carefully examine into the different elements that are essentially factors in the finding of the daily output of the respective mines which are to share in the allotment.⁵⁷ Among the matters to be investigated are the following: the working places, the number of mine cars and their capacity, the switch and tipple efficiency, the number and character of the mining machines in use, the hauling system and the power used, the number of miners' houses. No one of these various and essential elements can safely be said to be absolutely controlling, though it is likely that the most important of them all are the real working places, the available points at which coal can be profitably mined.⁵⁸ In one of the earlier cases upon this point the Commission held not unreasonable this system of distribution: the physical capacity, the commercial capacity for the first year, and the commercial capacity for the second year were added together and divided by three, the result obtained was the capacity basis for determining the percentage to which a particular mine was entitled to.⁵⁹ In

⁵⁶ *United States v. West Virginia Northern Ry. Co.*, 125 Fed. 252.

⁵⁷ An arrangement, entered into between a railroad and warehousemen along its route that cars shall be distributed to warehousemen, no notice being taken of storers as such, as it leaves possibilities of abuses in the dealings of the warehouseman, is not to be supported. *United States*

ex rel. v. Oregon Ry. & Nav. Co., 159 Fed. 975.

⁵⁸ But such distributing arrangements are not necessarily conclusive even when agreed upon between the railroad and the principal shippers. *United States v. Norfolk & W. Ry. Co.*, 143 Fed. 286, 74 C. C. A. 404.

⁵⁹ *Rail & River Coal Co. v. B. & O. R. R.*, 14 I. C. C. 86.

a later case a federal court held where in determining the number of cars to which various competing coal companies upon its line were entitled, defendant based the percentage on the capacity of the mine and on previous shipments, the capacity being allowed to count as 1, and the shipments as 2, in ascertaining the percentages, that such a system was improper and unfair to the shipper opening up new mines, and that percentages should be based solely on physical capacity of the mine.⁶⁰ In a case before the Commission subsequently it was held that the method of car distribution known as the "coke-oven basis," unduly discriminates against complainant, and that the so-called "capacity basis" of car distribution should be adopted, as the coke-oven basis does not fairly measure the relative rights of the various operators in the coal district, but unduly discriminates against business rights.⁶¹

§ 943. Respective requirements compared.

The occupation, the use, and the consequent reduction of the available equipment of the carrier are the vital matters in all plans of car distribution in times of shortage.⁶² While the mine capacity of a given shipper may be greater than his allotment of cars, yet where this is also the case as to other shippers similarly situated in the same coal field, it is the duty of the carrier, when the supply of cars is inadequate, to fairly distribute the available number among all operators.⁶³ The carrier owes a special duty to shippers who are entirely dependent upon it for transportation facilities.⁶⁴ The Act delegates to the Commission authority to regulate the distribution of coal fuel cars in times of car shortage as a means of prohibiting unjust preferences or undue discrimination.⁶⁵ While

⁶⁰ *United States v. B. & O. R. R.*, 165 Fed. 113.

⁶¹ *Powhatan Coal & Coke Co. v. Norfolk & W. R. Co.*, 19 I. C. C. 69.

⁶² *Royal Coal & Coke Co. v. So. Ry.*, 11 I. C. C. 440.

⁶³ *Powhatan Coal & Coke Co. v. Norfolk & W. R. Co.*, 11 I. C. C. 69.

⁶⁴ *National Coal Co. v. B. & O. R. R.*, 28 I. C. C. 442.

⁶⁵ *Traer v. C. & A. R. R.*, 13 I. C. C. 451.

the mine capacity of a given shipper of coal may be greater than his allotment of cars, yet where this is also the case as to other shippers similarly situated in the same coal field it is the duty of the carrier when the car supply is inadequate to fairly distribute the available number among all operators.⁶⁶ Where a coal company owns and operates several openings, and is entitled in the daily distribution to a certain number of cars for each mine, it will not be prohibited from grouping or pooling all these cars, or any portion of them, at one mine, instead of using them at each mine in accordance with their respective percentages, in the absence of definite evidence to show that such practice results in fact in undue and unlawful discrimination.⁶⁷

§ 944. Cars needed by railroads.

A carrier may send its equipment from its line for the things that are necessary and essential for its own operation, such right arising from considerations of public policy, which recognizes the duty of a carrier to operate its line, and being predicated on necessity and not on the carrier's right of private contract.⁶⁸ But the Commission may compel a railroad to count against the shipper the company's fuel cars, in the daily distribution in times of car shortage, under section 3 of the Act prohibiting preferences and discriminations.⁶⁹ And the coal sold to a carrier by a mine and shipped to it in the carrier's fuel cars is not to be counted in arriving at the mine's producing capacity, for the purpose of determining the percentage of cars to which it is entitled.⁷⁰ It is now well established, therefore, that a carrier in times of coal car shortage in making car distribution must charge against the percentage of a par-

⁶⁶ Powhatan Coal & Coke Co. v. N. & W. Ry., 13 I. C. C. 69.

⁶⁷ Rail and River Coal Co. v. B. & O. R. R., 14 I. C. C. 86.

⁶⁸ L. & N. R. R. v. Queen City Coal Co., 13 Ky. L. Rep. 832.

⁶⁹ Interstate Commerce Commission v. Illinois C. R. R., 215 U. S. 452, 30 Sup. Ct. 155.

⁷⁰ See Interstate Commerce Commission v. Chicago & A. Ry., 215 U. S. 479, 30 Sup. Ct. 153.

ticular shipper its fuel cars, and the foreign fuel cars assigned to such shipper, and a failure so to do constitutes undue discrimination under the Act.⁷¹ It seems that under the Act a carrier engaged in interstate commerce, in determining the distributive share of cars due to a particular shipper, must count against the shipper the private and foreign fuel cars supplied to him, although such cars are used only in intrastate commerce.⁷² If a mine, in filling its contract to supply fuel coal to the railroad, does not exhaust its equitable pro rata of cars, then cars should be given it for commercial shipments sufficient to complete its full pro rata share of all available cars.⁷³ It is, therefore, plainly established that fuel cars must be counted against the distributive share of the mine receiving them subject to the conditions and limitations herein stated.⁷⁴

§ 945. Private facilities considered in the apportionment.

By the most recent development in this law of car distribution the private cars utilized by a particular shipper are counted as part of his allotment.⁷⁵ In the distribution of cars by an interstate railroad company among coal mines on a percentage basis in times of shortage of cars, private cars owned by shippers or consignees, which have no right upon the company's tracks except by virtue of its charter, must be considered as leased to it and as forming a part of its commercial equipment; and while the owner is entitled to the exclusive use of such cars, they are to be counted against the mine as a part of its percentage in the distribution.⁷⁶ This whole matter as to the regulation of the distribution of cars was threshed out in a series

⁷¹ *United States v. Baltimore & O. R. R.*, 165 Fed. 113.

⁷² *Majestic Coal & Coke Co. v. Illinois C. R. R.*, 162 Fed. 810.

⁷³ *Royal Coal & Coke Co. v. So. Ry.*, 13 I. C. C. 440.

⁷⁴ *Hilldale Coal & Coke Co. v. P. R. R.*, 19 I. C. C. 356.

⁷⁵ But such distributing arrangements are not necessarily conclusive even when agreed upon between the railroad and the principal shippers. *United States v. Norfolk & W. Ry. Co.*, 143 Fed. 266, 74 C. C. A. 404.

⁷⁶ See *Logan Coal Co. v. Pennsylvania Ry. Co.*, 154 Fed. 497, holding

of cases in the United States Supreme Court recently.⁷⁷ It was noted that the regulations established by the railroads had dealt with the car situation as though there were four classes of cars: (1) System cars, that is, cars owned by the carrier and in use for the transportation of coal; (2) company fuel cars, that is, cars belonging to the company, and used by it when necessary for the movement of coal from the mines on its own line, solely for its own fuel purposes; (3) private cars, that is, cars either owned by coal mining companies or shippers or consumers and used for the benefit of their owners in conveying coal from the mines to designated points of delivery; (4) foreign, railway fuel cars, that is, cars owned by other railroad companies and sent to mines upon other lines, the coal being intended for use as fuel by such foreign railroad companies. As Mr. Justice White pointed out in making this analysis of the problem in the leading case, some systems of car distribution had excluded some of these classes from consideration in the allotment, and other systems had excluded others. Such class distinctions, he admitted, might perhaps be made by the railroads without its being personal discrimination. But, as he said in writing the opinion of the court, it was within the power of the Commission to insist that all shippers should be treated alike, regardless of what classes of cars they were utilizing in their shipments. It is now currently held that a carrier should give to owners or lessees of private cars the use of such cars; and should also give to a coal company the foreign railway fuel cars consigned to it; but such "private" and "foreign" railway fuel cars should, in the distribution of cars, be counted against the company, which should not be given, in addition to such delivery, a share

a division of cars based upon subtracting such special or private cars as were coming to a shipper from his capacity figures and allowing him his pro rata amount upon the balance not outrageous.

⁷⁷ See *Interstate Commerce Commission v. Chicago & Alton R. R. Co.*, 215 U. S. 479, 30 Sup. Ct. 163; *Baltimore & Ohio R. R. Co. v. United States ex rel.*, 215 U. S. 481, 30 Sup. Ct. 155.

of the system cars except when the number of "private" and "foreign" railway fuel cars so delivered is less than its distributive share of the available cars, including system cars, foreign railway fuel cars, and so-called private cars.⁷⁸ However, it is still true that owners of private cars are entitled to their use, even though their number exceeds ratable proportion; but they must be counted against the distributive share of mine receiving them.⁷⁹

⁷⁸ Railroad Commission of Ohio v. Hocking Valley Ry., 2 I. C. C. 398.

Compare the doctrines of the Commission as to the necessity of charging demurrage upon private cars when in use, even while being unloaded by the owner, in order to make no discrimination against those using system cars. See Proctor Gamble & Co. v. United States, 225 U. S. 282, 32 Sup. Ct. 761.

⁷⁹ Hillsdale Coal & Coke Co. v. P. R. R., 19 I. C. C. 356.

Suppose, for example, there are as between two mines A and B of equal capacity on a given day 100 of these specially classified cars specifically directed to the A mine for billing and 80 of the general system cars available for distribution; under these rules the B mine will get all of the 80 system cars. If there were 80 special cars for the A mine and 100 system cars, the B mine would get 90 of the system cars, giving the B mine 10 of them.

CHAPTER XX

REGULATION OF FINANCIAL OPERATIONS

- § 950. Provisions of the Act.
- 951. Prohibition of intercorporate relationships.

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§ 950. Provisions of the Act.

The scope of the powers of the Commission under section 20 has already been indicated. As to reports from the carriers subject to its jurisdiction, the Commission requires annual reports in such form as it prescribes to elicit such information as it may desire. Such annual reports shall show in detail the capital accounts of the corporation and the dividends paid, including the funded and floating debt and the interest and cost therefor and also the operating expenses and receipts therefrom including the amounts expended in betterments and improvements, together with the balances of profit and loss, and a complete exhibit of the financial operations for the year, including an annual balance sheet. The Commission has authority by general or special orders to require the carriers to file monthly reports of earnings and expenses, and to file periodical or special, or both periodical and special, reports concerning any matters about which the Commission is authorized or required to inquire or to keep itself informed or which it is required to enforce. As to accounts the Commission may by further provisions of section 20 prescribe the forms of any and all accounts to be kept by carriers including all memoranda relating thereto, and it may impose upon the carriers a uniform system of accounting. The Commission has access to all accounts, records, and memoranda kept by carriers subject to this Act, and it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by the Commission. Reference should also be made to the Valuation Act of 1903, providing that the Commission shall investigate, ascertain, and report the value of all the property owned or used by every

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common carrier subject to the provisions of this Act. As a result of its investigations, the Commission shall make an inventory which shall list the property and that of every common carrier subject to the provisions of this Act in detail, and show the value thereof as hereinafter provided, and shall classify the physical property, as nearly as practicable, in conformity with the classification of expenditures for road and equipment, as prescribed by the Commission so that once made the figures can be kept current.

§ 951. Prohibition of intercorporate relationships.

As to pooling the original Act provided that it should be unlawful for any common carrier subject to its provisions to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freight as aforesaid, each day of its continuance shall be deemed a separate offense. Reference should also be made to the Sherman Anti-Trust Law declaring against all combinations in restraint of trade and conspiracies against commerce between the States. Of course, any such action if proved against carriers very obviously would constitute restraint of interstate commerce, a thing which it is difficult to prove in the case of merchants in manufacturing businesses of the times. Furthermore, as to intercorporate relations it has recently been provided in the Panama Act of 1912 that unless it appears to be in the interest of the public railroads cannot own competing water lines, the determination of that question being left to the Commission. And by the Clayton Act of 1914 it is provided that there shall be no substantial ownership by stock control in a competing railroad, that question being again left to the Commission. There are also provisions against

interlocking directorates, and especially against common control of carrier corporations and supply companies. These various provisions are too elaborate for inclusion in this preliminary section; and so a section is devoted to each later in this chapter.

Topic A. Supervision of Current Accounting

§ 952. Who must file reports.

Generally speaking only those concerned with such carriage as the Act has constitutionally subjected to the jurisdiction of the Commission can be called upon to keep their accounts as prescribed by the Commission and report as required by the Act.⁸⁰ Thus a railroad located altogether within a State which keeps itself without any entangling arrangements with other carriers is held not to be required by the Act to make any reports to the Commission.⁸¹ This is so because such companies are not considered as participating in the carriage of goods between the States. On the other hand, where a railroad takes part in the carriage of the traffic between states on any basis which may evidence its participation therein, it thereby becomes a carrier subject to the Act in this respect as in all others. This would plainly be in the case where a carrier issues through bills, or accepts a division of the through rate.⁸² But in many cases where the concern of the company is less obviously direct, it may still be found to be so far participating in the carriage as

⁸⁰ United States ex rel. v. Kansas City & So. Ry., 81 Fed. 783.

A car ferry company connecting two interstate rail lines by which it is owned is a carrier subject to the Act although it has no direct dealings with the public, and must report to the Commission keeping its accounts as it prescribes. I. C. C. Conference Ruling No. 374.

⁸¹ Interstate Commerce Commis-

sion v. Bellaire C. & Z. R. R., 77 Fed. 942.

A bridge company which performs no transportation but simply rents its bridge to an interstate carrier, need not report to the Commission as it is not a carrier subject to the Act. I. C. C. Conference Ruling No. 381.

⁸² Interstate Commerce Commission v. Seaboard A. L. Ry., 82 Fed. 563.

to be subject to the jurisdiction of the Commission. Thus a railroad which ostensibly is only the lessor in an involved arrangement may be obliged to report as provided in the Act.⁸³

§ 953. Extent of powers over accounts.

It has lately been decided by the Supreme Court of the United States that the federal government can compel the keeping of the books of a company doing both an interstate and an intrastate business, so as to show the whole operations of the company in such way as the Commission may prescribe under the Act.⁸⁴ The idea underlying this is that the knowledge as to all the doings of the company may be necessary to deal intelligently with its interstate business. Following this line of reasoning a Texas court has still more recently held that a State government may compel such carriers to keep its figures as to its interstate business in such ways as may be prescribed.⁸⁵ This result may well be questioned as the analogy drawn ignores the paramount power of the Federal government to brush aside conflicting State rules, to which there is no corresponding power in the States. The extent to which the Commission can go in the exercise of this power over accounts has only very recently been established. But it is now well settled that leaving to the Commission the carrying out of details in the exercise of its discretion under section 20 to prescribe a uniform system of accounting and bookkeeping for the carriers subject to the Act, does not render this section invalid as a delegation of legislative authority.⁸⁶ That the enforcing of such a course upon carriers subject to the Act with the disclosures it imposes, even when penalties may be imposed upon the corporation, largely as a result of the

⁸³ *United States v. Union S. Y. & T. Co.*, 226 U. S. 286, 33 Sup. Ct. 83.

⁸⁴ *Interstate Commerce Commission v. Goodrich Tr. Co.*, 224 U. S. 194, 56 L. ed. 729, 32 Sup. Ct. 436.

⁸⁵ *Railroad Commission of Texas v. Texas & P. Ry. (Tex.)*, 40 S. W. 829.

⁸⁶ *Kansas City So. Ry. v. United States*, 231 U. S. 423, 34 Sup. Ct. 125.

information thereby imparted, is not an unreasonable search or seizure such as is defined in the Constitution, is also now clearly established.⁸⁷

§ 954. Methods of amortization accounting.

As a matter of accounting, depreciation can be taken care of in different ways. There is the method of taking obsolescence from year to year to the amount of the wear for that year, considering that at the first the depreciation is slight; so this line of the depreciation sharply curves off as the effects of the wear accumulate. Then there is the method of equating the depreciation for the whole period of the life of the property, so that the setting aside of that sum each year would produce an amount at the end of the period equal to the amount of the original investment, which is known as the straight line method.⁸⁸ How these sums in either case shall be handled constitutes another difference. They might actually be set aside in banks as accruing funds, or an equivalent amount in new equipment might be purchased for each year. There are arguments for each of these policies; but it will be noted that the latter is a saving to the public. The company should get its profit each year upon the investment which it is taking this method of keeping good; there should be no business profit upon the sums set aside, however. It follows that by the second method the public really gets additional equipment at its disposal without paying a profit upon it.⁸⁹ Whether depreciation should invariably be charged against the operating expenses of the year, or whether if the company has a surplus at any time it may be taken out of that, is not a matter about which one can be dogmatic. But it would seem that it would be prefer-

⁸⁷ *Baltimore & O. Ry. v. Interstate Commerce Commission*, 221 U. S. 612, 55 L. ed. 678, 31 Sup. Ct. 621.

⁸⁸ See the general discussion in the *Minnesota Rate Cases*, 230 U. S. 352, 33 Sup. Ct. 729.

⁸⁹ If the requirements for depreciation are at any time abnormal, they may be projected over the operating expenses of several years. *Kansas City So. Ry. v. United States*, 231 U. S. 423, 34 Sup. Ct. 125.

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able to charge it annually against the traffic which gets the benefit of the use instead of against shippers at some other period.

§ 955. Depreciation cannot be capitalized.

It is now well established that not only is it the right of the company to make such a provision, but it is its duty to its bond and stockholders, and, in the case of a public service corporation at least, its plain duty to the public. If a different course were pursued the only method of providing for replacement of property which has ceased to be useful would be the investment of new capital and the issue of new bonds or stocks. This course would lead to a constantly increasing variance between present value and bond and stock capitalization—a tendency which would inevitably lead to disaster, either to the stockholders or to the public, or both.⁹⁰ If, however, a company fails to perform this plain duty and to exact sufficient returns to keep the investment unimpaired, whether this is the result of unwarranted dividends upon over-issues of securities, or of omission to exact proper prices for the output, the fault is its own; when, therefore, a public regulation of its prices comes under question the true value of the property then employed for the purpose of earning a return cannot be enhanced by a consideration of the errors in management which have been committed in the past. It is entirely consistent with this theory that where a public service corporation raises more money in a particular year than is required for actual depreciation it cannot carry the excess to capital for the purpose of estimating the amount on which it is entitled to pay dividends.⁹¹

§ 956. Writing off superseded property.

The theory upon which the Commission has acted in formulating its regulations is fully stated in its brief in

⁹⁰ *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. 148.

⁹¹ *Louisiana Railroad Comm. v. Cumberland Telephone Co.*, 212 U. S. 414, 53 L. ed. 577, 29 Sup. Ct. 357.

the recent case of the Kansas City Southern Railway,⁹² as follows: Depreciation is of two kinds,—(1) that which is not replaced in kind, and (2) that which is replaced by improved material. In the first case the property has served its purpose, and only past operations have benefited from it. So far as the profits of past operations have not been distributed to the stockholders, they are represented in the Profit and Loss Account, and therefore such an abandonment or depreciation is properly chargeable to that account unless a special depreciation account has been established in anticipation of such abandonments. The other kind of depreciation is the result of changes attributable to the inadequacy of the existing property to meet the demands of the future. Abandonments occasioned by changes of this character are therefore chargeable to future earnings, for the reason that the improved condition of the road is not only designed to meet the demands of the future, but presumably will result in economies of operation. The railroad company may, if it sees fit, anticipate general depreciations, and make provision for them by establishing a reserve for the purpose; but if no such provision has been made, the abandonment should be taken care of by charging them to present or future operating expense. After a careful study of this whole situation the Supreme Court committed itself to the extent of holding that although something was to be said for other methods which might have been established, still the question being whether the Commission had exceeded its powers, a statement of its theory was sufficient to show that the regulation was not arbitrary, in the sense of being without reasonable basis, and there was evidence to show that the Commission was warranted in adopting it, as sustained by expert opinion and approved by experience.⁹³

⁹² Kansas City So. Ry. v. United States, 231 U. S. 423, 34 Sup. Ct. 125. current in the courts in *Brymer v. Butler Water Co.*, 179 Pa. St. 231,

⁹³ See the vague doctrines formerly 36 Atl. 249.

§ 957. Supervision of fixed charges.

Since it seems to be established that a railroad is only entitled to earn annually a sum sufficient to pay its operating expenses and a fair return on the present value of the property used for the public, the depreciation regulations of this sort will not tend to decrease the sum on which the company may earn a fair return but will affect the payment of current dividends. It is true that on the question of exactly how that value is to be determined, the law is in a stage of development, but clearly the value as shown by the books, of the property being used for the public, must play an important part in the determination, both when the company itself fixes the rates and when the Commission adjusts them.⁹⁴ Valuations for rate purposes which omit the element of depreciation would therefore seem to be erroneous; depreciation is lessened value due to deterioration physically or lack of adaptation to its function. Abandoned property is obviously no longer adaptable to function, and therefore such regulations as are being discussed seem both justifiable and necessary. The railroads argue that the cost of abandoned property is part of the cost of progress, and should therefore be retained in the property accounts, runs counter to the whole "present value" theory enounced by the Supreme Court. It would make the actual cost of the plant regardless of depreciation, and not its present value, the test for valuation purposes. If property is discarded, it is no longer used for the public, and therefore no return can be earned on it, even though the disallowance of such return results in a decrease or loss of dividends. It may be said that when improvement is made of an existing line, the company has withdrawn no property from public use, since the former construction still serves as a base for the new line, and hence as a matter of accounting the value of the old line need not be subtracted from the property accounts.

⁹⁴ See the elaborate discussion *Smyth v. Ames*, 169 U. S. 466, 42 from the earlier point of view in L. ed. 819, 18 Sup. Ct. 419.

The reply to that contention would be that, in ascertaining present value for rate purposes, a deduction for depreciation would have to be made to cover the decreased value of the old line when used simply as a base or foundation for the new line with its changed grades. That is, it would not be correct to say that the present value of the line equals the cost of the old line plus the cost of the improvements.⁹⁵

§ 958. Permanent improvements out of capital.

Of course, it should be clear that outright new construction should not be charged to annual expenditures in any accounting, but that such investments belong in the capital account along with the original outlays in construction. Thus no advance in rates should result from construction of branch lines.⁹⁶ And no permanent improvements of any sort should be charged to operating expenses for a year.⁹⁷ And as cost of betterments should not be charged to operating expenses, they constitute no justification in themselves for increase in rates.⁹⁸ The Commission has held consistently to the doctrine that permanent improvements are no part of operating expense.⁹⁹ Finally when the railroads began to get restive as this ruling based upon this policy began to limit their course of finance, suit was brought to enforce the order of the Commission that the carriers desist from this practice. The court fully sustained the Commission,¹ distinguishing a former² case from the one at bar, as that case was not dealing with rates of transportation or the rule which should determine them against shippers. But such is not the relation or concern of a shipper of

⁹⁵ See *Minnesota Rate Cases*, 230 U. S. 352, 33 Sup. Ct. 729.

⁹⁶ *City of Spokane v. N. P. Ry.*, 19 I. C. C. 162.

⁹⁷ *Louisville & Nashville Railroad Coal and Coke Rates*, 26 I. C. C. 20.

⁹⁸ *New York Butter and Cheese Rates*, 28 I. C. C. 330.

⁹⁹ *In re Advances in Rates, Eastern Case*, 20 I. C. C. 243.

¹ *Illinois C. Ry. v. I. C. C.*, 206 U. S. 441, 51 L. ed. 1128.

² *Union P. Ry. v. U. S.*, 99 U. S. 402, 25 L. ed. 274.

lumber. His right is immediate, said the court. He may demand a service. He must pay a toll, but a toll measured by the reasonable value of the service. The elements of that value may be many and complex, not always determinable, as we have seen, with mathematical accuracy, but, we think, it is clear that instrumentalities which are to be used for years should not be paid for by the revenues of a day or year; and this is the principle of returns upon capital which exists in durable shape.

§ 959. Absorbing earnings in improvements.

The Commission has from the first been consistently working toward the goal it has now reached. In *Central Yellow Pine Ass'n v. Illinois Central Railroad*,³ the Commission had before it an advance in the rate on yellow pine lumber from points of production in the South to the Ohio River. This advance was justified by the carriers upon the plea that owing to increased cost of operation their net returns were insufficient. In examining this matter the Commission found that the carriers had charged as a part of their operating expenses large sums, which had, in fact, been devoted to the purchase of new equipment and to the making of permanent improvements to their roadway and structures, and held that these items were not properly chargeable as operating expenses, for the reason that the shipper of to-day could not be properly required to pay the entire cost of an improvement or addition which was to be of permanent use. The opinion was expressed that sufficient net returns would appear if these items of permanent use had not been included in the cost of operation. In *Tift v. Southern Railway*⁴ at about the same time the same contention of inadequacy of earnings was made, and it was found upon examination of the items going to make up the operating expense account, many expenditures which result in the permanent improvement or betterment of the property of the roads, such as expenditures

³ 10 I. C. C. Rep. 505.

⁴ 10 I. C. C. Rep. 543.

for right of way and station grounds, real estate, grading, tunnels, bridges, trestles and culverts, rails, ties, crossings and cattle guards, telegraph lines, station buildings and fixtures, shops, round houses, turntables, water stations, fuel stations, grain elevators, storage warehouses, docks and wharves, electric light plants and electric motive power plants, gas making plants, and miscellaneous structures. There were also included expenditures for equipment in the way of locomotives and cars of all kinds. And the Commission thereupon said that they should not, therefore, be taxed as part of the current or operating expenses of a single year, but should be so far as practicable and so far as rates exacted from the public are concerned, "projected proportionately over the future."

Topic B. Separation of Interstate Accounts

§ 960. Apportionment of interstate business.

Where a road runs through several States the Constitution as interpreted by the Supreme Court of the United States requires that the value of the plant utilized in the intrastate business and the net earnings from such business must both be ascertained in order to determine whether the rates fixed by the State or its Commission are reasonable or confiscatory. In the leading case in the United States Supreme Court on this point *Smyth v. Ames*,⁵ Mr. Justice Harlan said: "In our judgment, it must be held that the reasonableness or unreasonableness of rates prescribed by a State for the transportation of persons and property wholly within its limits must be determined without reference to the interstate business done by the carrier, or to the profits derived from it. The State cannot justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, over which, so far as rates are concerned, the State has no con-

⁵ 169 U. S. 466, 42 L. ed. 89, 18 Sup. Ct. 418.

trol. Nor can the carrier justify unreasonably high rates on domestic business upon the ground that it will be able only in that way to meet losses on its interstate business. So far as rates of transportation are concerned, domestic business should not be made to bear the losses on interstate business, nor the latter the losses on domestic business.”⁶

§ 961. Methods of the division.

The method of procedure in such a case is to find what part of the gross receipts is derived from business within the State, and then find the actual cost of doing the business. This cannot be found by taking a proportionate part of the cost for the entire line, since the cost of moving local freight is greater than that of moving through freight. “Additional fuel is consumed at each station where there is a stop. The wear and tear of the locomotive and cars from the increased stops and in shifting cars from main to side tracks is greater; there are the wages of the employees at the intermediate stations, the cost of insurance, and these elements are so varying and uncertain that it would seem quite out of reach to make any accurate comparison of the relative cost. And if this is true when there are two separate trains, it is more so when the same train carries both local and through freight. It is impossible to distribute between the two the relative cost of carriage. Yet that there is a difference is manifest, and upon such difference the opinions of experts familiar with railroad business is competent testimony, and cannot be disregarded. The fact that an exact mathematical computation of the cost is impossible is immaterial; the cost must be found, as best it may, before the reasonableness

⁶ In Minnesota the State court had taken the other alternative possible by assuming that a similar rate would be adopted throughout the whole system, the court feeling that

there was not any good reason why a railway system should be divided on State lines at all. *Steenerson v. Gt. Northern Ry. Co.*, 69 Minn. 353, 72 N. W. 713.

of the local rate can be determined. There are many things that have to be determined by court and jury in respect to which mathematical accuracy is not possible.”⁷

§ 962. Bases of the proportion.

In one of the State cases⁸ the problem was discussed in this manner: “The other issue the respondent has likewise failed to meet. Taking the figures from the brief filed by the respondent, we find that the local business alone produces a net earning of at least 3 per cent. on the total value of the road in Florida, charging against such income the whole of the taxes. While a State is not permitted to offset local business against interstate business, and to justify low local rates by reason of the profitability of the latter, yet the interstate and foreign business may and should be considered in determining the proportion of the value of the property of the company assignable to local business. There is no proper showing of the interstate and foreign business, so that we may determine on what fraction of the whole value of the property in Florida the company might be entitled to earn an income from local business. There is, however, a showing that the interstate and foreign business is large, and on a proper showing and a proper proportioning of the service between domestic and foreign business this percentage of net income would be largely increased. Under the scheme of distribution of the earning of the whole road between the several States through which it runs, a ton of Florida oranges or early vegetables is allowed the same credit as a ton of coal in Virginia, and no more. We have examined with care all the rate cases decided by the Supreme Court of the United States, and see nothing therein to conflict with the views expressed above.”

⁷ Chicago, M. & St. P. Ry. v. Tompkins, 176 U. S. 167, 44 L. ed. 418, 20 Sup. Ct. 336, reversing S. C. 90 Fed. 363.

⁸ State v. Atlantic C. L., 48 Fla. 114, 37 So. 657.

§ 963. Apportionment of total expense.

The recent State legislation reducing passenger fares could only apply to intrastate business. To determine whether this reduction was unjustifiable the Federal courts saw that they were required not only to allocate the respective costs of passenger and freight business but also to apportion these to the intrastate and interstate business. In one of the latest cases⁹ on this subject Judge McPherson narrowed the discussion to two theories—the mileage proportion and the revenue proportion. He admitted that neither of these would result in mathematical accuracy; but he insisted that as a practical matter the one which promised to be most satisfactory should be taken as the basis of action. “The theory to now recognize must be either the proportion of earnings, State or interstate, or ton and passenger mile.” After reviewing what few cases there are bearing upon the point, all of which agree upon the greater proportionate cost of local business as compared with through business, he said that, although other standards are suggested, the more satisfactory and accurate was “the difference in cost in relation to the revenue.”¹⁰

§ 964. Inherent difficulties of the problem.

The interblending of operations in the conduct of interstate and local business by interstate carriers is apparent. The same right of way, terminals, rails, bridges, and stations are provided for both classes of traffic; the proportion of each sort of business varies from year to year, and indeed, from day to day. It may be urged, therefore, no

⁹ In *St. Louis & S. F. R. R. Co. v. Hadley*, 168 Fed. 317.

Citing *Northern Pacific R. R. Co. v. Keyes*, 91 Fed. 47; *Chicago, M. & St. P. Ry. Co. v. Smith*, 110 Fed. 473; *In re Arkansas R. R. Rates*, 163 Fed. 141; *Chicago, M. & St. P. Ry. Co. v. Tompkins*, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. 336.

¹⁰ In *Washington So. Ry. v. Com.* (Va.), 71 S. E. 539, the court refused in the absence of proof by the carrier of the proportions of its interstate and intrastate accounts to protect it from the operation of a 2½ cent per mile passenger rate order of the State Commission.

regulation of rates can be just which does not take into consideration the whole field of the carrier's operations, irrespective of State lines. And attention is drawn to the extreme difficulty and intricacy of the calculations which must be made in the effort to establish a segregation of intrastate business for the purpose of determining the return to which the carrier is properly entitled therefrom. Yet realizing all this the Supreme Court said in the Minnesota Rate Cases:¹¹ "But these considerations are for the practical judgments of Congress in determining the extent of the regulation necessary under existing conditions of transportation to conserve and promote the interests of interstate commerce. If the situation has become such, by reason of the interblending of the interstate and intrastate operations of interstate carrier, that adequate regulation of their interstate rates cannot be maintained without imposing requirements with respect to their intrastate rates which substantially affect the former, it is for Congress to determine, within the limits of its constitutional authority over interstate commerce and its instruments the measure of the regulation it should supply." ^{11a}

§ 965. Comparisons with interstate rates.

The fact that a rate does not cross a State line is no reason why it may not be considered when an interstate rate over the same line and for substantially the same distance is under examination.¹² The rates established by a State Commission cannot be taken as conclusive of the unreasonableness of higher interstate rates between the

¹¹ 230 U. S. 352, 33 Sup. Ct. 729.

^{11a} It should be noted that, with what seems an inconsistency, the regulation of service is not dealt with as precisely in this matter as the regulation of rates; at all events, in ordering a service to be performed within its borders the commission of

a state will apparently be allowed to justify its requirement, if the business of the system as a whole is profitable. *Atlantic C. L. Ry. v. No. Car. Corp. Comm.*, 206 U. S. 1, 51 L. ed. 993, 27 Sup. Ct. 585.

¹² *Board of Mayor and Aldermen v. V. & S. W. Ry.*, 15 I. C. C. 453.

same points, since the rates voluntarily established by a carrier are entitled to the same presumption of unreasonableness as that attaching to rates prescribed by a State Commission.¹³ In determining the reasonableness of an interstate rate, the decisions of the several State Commissions are worthy of consideration; but the Commission is not justified in accepting a comparison of lower intrastate rates prescribed by the State authorities, with those applying on interstate traffic as conclusive of the unreasonableness of the interstate rates.¹⁴ While in determining interstate rates similar rates established by State authority must have great influence, especially where they have been long acquiesced in by the carriers; still such rates have no binding force upon the Commission, and where the Commission finds the State rates unreasonable, a through interstate rate may be established by it higher than the sum of the State locals.¹⁵ The Commission is not controlled by the rates established by State Commission, unless they seem to be reasonable when applied to interstate movement.¹⁶ Certainly a low State rate is no reason for exacting unreasonable interstate rates.¹⁷

§ 966. Supremacy of the federal system.

The Shreveport case¹⁸ recently decided by the Supreme Court has resolved most of the doubts in relation to the situation in question. This appeal to the courts was the result of an order of the Commission directing the carriers concerned "to duly and justly equalize the terms and conditions" upon which they will extend "transportation to traffic of a similar character, moving into Texas from Shreveport, with that moving wholly within Texas." In

¹³ Paola Refining Co. v. M., K. & T. Ry., 15 I. C. C. 29.

¹⁴ Marshall Oil Co. v. C. & N. W. Ry., 14 I. C. C. 210.

¹⁵ Corn Belt Meat Producers Ass'n v. C., B. & Q. Ry., 14 I. C. C. 376.

¹⁶ Bartles Oil Co. v. C., M. & St. P. Ry., 17 I. C. C. 146.

¹⁷ Fort Dodge Commercial Club v. I. C. R. R., 16 I. C. C. 572.

¹⁸ Houston, E. & W. T. Ry. v. United States, 234 U. S. 833, 34 Sup. Ct. 833.

affirming this order in principle the Supreme Court said: "It is also clear that, in restraining the injurious discriminations against interstate traffic arising from the relation of intrastate to interstate rates, Congress is not bound to reduce the latter below what it may deem to be a proper standard, fair to the carrier and to the public. Otherwise, it could prevent the injury to interstate commerce only by the sacrifice of its judgment as to interstate rates. Congress is entitled to maintain its own standard as to these rates, and to forbid any discriminatory action by interstate carriers which will obstruct the freedom of movement of interstate traffic over their lines in accordance with the terms it establishes. Having this power, Congress could provide for its execution through the aid of a subordinate body; and we conclude that the order of the Commission now in question cannot be held invalid upon the ground that it exceeded the authority which Congress could lawfully confer."

§ 967. Discrimination produced by State action.

The orders of a State commission do not justify interstate discriminations.¹⁹ But the Commission cannot remove such discrimination by reducing State rates.²⁰ However for a carrier to apply higher rates to interstate than to State traffic under like conditions is a violation of the law.²¹ An order of a State railroad commission enforcing discriminations against interstate commerce is not acceptable under the Act.²² Where jobbing centers are situated near State lines, an advance of the interstate charge and the retention of the present charge on State shipments inevitably results in a discrimination against the former.²³ There are many reasons why State and inter-

¹⁹ *R. R. Commission of La. v. St. L. S. W. Ry.*, 23 I. C. C. 31.

²⁰ *Andy's Ridge Coal Co. v. S. Ry.*, 18 I. C. C. 405.

²¹ *Keogh v. M., St. P. & S. Ste. M. Ry.*, 26 I. C. C. 73.

²² *Cement Rates from Pennsylvania to New Jersey*, 26 I. C. C. 687.

²³ *In re Rates for Single Packages*, 22 I. C. C. 328.

state rates should be established in harmony with one another; and when the Commission is asked to examine the reasonableness of an interstate rate, similar rates established by State authority in that territory must have great influence, especially where they have been long acquiesced in by the carriers.²⁴ Still these State rates have no binding force upon the Commission; they are standards of comparison of greater or less value, according as they appear to be just and reasonable. Low State rates cannot be neutralized by increases in interstate rates;²⁵ for a carrier cannot lawfully discriminate against interstate in favor of intrastate traffic.²⁶

Topic C. Valuation of Carrier's Property

§ 968. The tests of the Supreme Court.

Any discussion as to what principles are to be considered as weighing with the courts in the determination of capital always recurs to this significant paragraph in *Smyth v. Ames*.²⁷ "We hold that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and were to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating

²⁴ *Corn Belt Meat Producers' Ass'n v. C., B. & Q. Ry.*, 14 I. C. C. 376.

²⁵ *Commercial Club of Omaha v. Anderson & Saline River Ry.*, 18 I. C. C. 532.

²⁶ *In re Advances on Hay*, 25 I. C. C. 680.

²⁷ 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. 419.

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the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience." ²⁸

§ 969. The inquiries of the Congress.

It has been seen that many theories as to the basis to be taken in valuing the property of public utilities have been advanced at different times; and that indeed each of them has its advocates at the present day. The actual securities at present outstanding are by a few still regarded as sacred, while at the other extreme are those who would protect nothing but the estimated cost of theoretically reproducing the physical properties less the demonstrated depreciation of the actual properties. The serious issue is between two remaining theories, one taking the actual cost from first to last of the properties in question as the base, the other seeking to determine the present value of these properties as going concerns.²⁹ A close reading of the recent Act of Congress ordering the valuation of the railways will show that all of these theories at least must have been in the minds of the lawmakers. The Commission is expressly directed to determine individually and report separately the amount of securities outstanding and the circumstances surrounding their issue, the cost of reproduction, and what deduction should be made for actual depreciation, the original cost to date of each piece of property owned by the carrier, and all the elements of value discoverable in the properties under examination. Congress is making no decisions as yet; it is asking that all the facts may be brought out.³⁰

§ 970. The investigations of the Commission.

Since its organization the Commission had occasion several times to inquire into the justification for more

²⁸ The inconsistency of these tests has often been pointed out by the Commission, see *Re Advances in Freight Rates*, 9 I. C. C. 391, *passim*.

²⁹ See the *Advances in Rates Cases* of 1910, 20 I. C. C. 243.

³⁰ See the *Five Per Cent Cases* of 1914, Aug. 2 and Dec. 18, 1914.

or less general advances in freight rates, which have been scheduled from time to time by the trunk lines. It has always been urged by counsel at such times that the railroads should have the right to advance rates until it was shown that they were earning more than a fair return upon their outstanding capitalization. The Commissioners have, therefore, felt called upon to indicate in elaborate opinions their views upon this troublesome question of the proper basis of capital charges. They have thus discussed and criticised all of the existing theories; and quotations from their opinions on various points will therefore be made in the following paragraphs.³¹ Before 1910 the railroads could put in force schedules advancing their rates, leaving it to subsequent proceedings before the Commission to show that the rates were unreasonable. But to prevent this in 1910 legislation was passed giving the Commission power to suspend advances in rates pending an investigation to their reasonableness.³² From time to time very frequently of late years the Commission has conducted special investigations of the financial conditions of certain systems. These have been held either by express direction of Congress or one of the houses thereof, or as part of some proceeding before it or as an independent investigation on its own initiative.³³ In these investigations it has had occasion to inquire into the issue of securities, the bases of capitalization, the allocation of charges, and the provision of depreciation. A great amount of material for study has thus been accumulated.³⁴

§ 971. Necessity for official valuations.

Previous to the recent legislation directing the Commission to undertake a valuation of the railroads of the

³¹ See particularly *Re Advance in Freight Rates*, 9 I. C. C. Rep. 391, *passim*.

³² See also *Re Advances in Rates*, 20 I. C. C. Rep. 243, *passim*.

³³ See particularly the New York,

N. H. & H. Finances, and the St. Louis & S. F. Investigation.

³⁴ See also the Chicago, M. T. P. S. Accounts, and the New York C. & H. R. R. R. Consolidation.

country the Commission has often remarked that it has no authority to put a value upon railroad property or to prescribe elements to be considered in determining that value.³⁵ And it has had occasion to remark that if any importance whatever is to be attached to the cost of reproduction in the establishment of railway rates, the valuation must be undertaken by the Government itself.³⁶ It is plain that until there be fixed, either by legislative enactment or judicial interpretation, some definite basis for the valuation of railroad property and some limit up to which that property shall be allowed to earn upon that valuation, there can be no exact determination of these questions.³⁷ In the absence of such a standard the tribunal, whether court or commission, which is called upon to consider this matter, can only rely upon the exercise of its best judgment.³⁸ How the Commission is likely to be inclined in dealing with the valuation of the properties of the carriers may only be judged from what it has said already in former investigations, so far as these have a general character; and therefore, some quotations from the most important of them will be made at this point.

§ 972. Valuation based upon investment.

It is often urged that the money actually invested in a railway ought to furnish a basis upon which returns should be made, and this is at first thought a plausible suggestion and might in many cases be a reasonably just one. In many cases it would not, as the Commission has pointed out. "It was said in argument before the Commission recently that the capitalization of the Mobile & Ohio Railway represented the actual money which had been invested in that property, and no more. This road was largely obliterated by the civil war, and was operated at

³⁵ In re Advances in Rates, Eastern Case, 20 I. C. C. 243.

³⁶ City of Spokane v. N. P. Ry., 15 I. C. C. 376.

³⁷ Re Advances in Freight Rates, 9 I. C. C. Rep. 382.

³⁸ Morgan Grain Co. v. A. C. L. R., 19 I. C. C. 460.

great loss during that war. All this is now represented in its capital stock. Should the stockholders of that railway company be indemnified for the loss of their property when almost every species of property in that section was destroyed? Where there is no question of war, or its devastations, the money actually paid into a railway property may represent all manner of waste and extravagance. Clearly the public ought not to pay this.³⁹ It is frequently claimed that a railroad should be allowed to earn upon the basis of its capitalization. Such a test as this is even worse than the last preceding, for while money actually invested in a railway property may represent disaster or extravagance, or even positive dishonesty, there are numerous cases where the capital stock of such company represents absolutely nothing whatever. The Erie Railway is capitalized at the present time for nearly \$300,000 per mile. The Lake Shore & Michigan Southern Railway, which is in a way a parallel and competing line, and in every sense better in point of construction and equipment, is capitalized for about \$100,000 per mile. These two roads both carry grain from Chicago to New York; the Lake Shore much more economically than the Erie; and the rate must be the same by both. Which capitalization shall govern?"

§ 973. Present value the basis of valuation.

The railways have succeeded in their contention that they should be allowed to earn interest on their funded debts and a dividend upon their capital stock so far as this is a fair return upon the value of that which it employs for the public convenience. "But," said the Commission in one investigation, "what is the value of a railway? Does not that value depend almost wholly upon the rate which it is permitted to charge? If the rates upon a railway system are reduced without thereby stimulating the movement of traffic the value of the property is diminished.

³⁹ Re Advances in Freight Rates, 9 I. C. C. 391.

If its rates are advanced without loss of traffic the value of its property is increased. Stated in another way: the value of a railway depends upon what it can earn on the basis of a reasonable rate, and the reasonableness of a rate depends upon the return which it will yield upon the value of the property."⁴⁰ The cost of reproducing railway property has been suggested as a basis upon which return should be allowed. "But this, while of great assistance in arriving at a just result, could not be taken as an exclusive guide. Many of our railways were built years ago, when the cost of construction was much greater than now. In the development of that industry they have been reconstructed and improved. The first outlay has perhaps been rendered practically worthless, and a railway honestly managed, never having paid excessive dividends, may actually represent to-day much more money than the present cost of building. Those who originally invested their money in this enterprise and have kept pace with the public necessities ought not to be required to bear the entire burden of this shrinkage."

§ 974. Whether market values should be considered.

There is another aspect in which this stock and bond factor is important.⁴¹ "The Government has invited private capital to invest in the construction and operation of these public utilities. While it might have established the rate, it has left that to competitive forces. The public has for many years known the results of the operations of these defendants, and their securities have thereby acquired certain values upon the market. At these values enormous private investments have been made. Now, this Government having permitted this to be done cannot close its eyes to the fact that it has been done. We cannot be oblivious to the effect of our action upon the value of these investments, which have been made in good faith. In

⁴⁰ Re *Advances in Freight Rates*, Co. v. Pub. U. Comm'rs, N. J. Ct. E. *supra*. & App., filed Dec. 9, 1914.

⁴¹ See the opinion in *Public Serv.*

this view the market value of these stocks and bonds for the last 10 years certainly, and the effect which our action may have upon their market value for the future, must be considered. We cannot, of course, allow such rates as will in all cases guarantee or perpetuate the prices at which these stocks have been bought, but in viewing the entire situation we should have it in mind.”⁴²

§ 975. Consideration given to the entrepreneur.

The suggestion was thrown out in one opinion of the Commission⁴³ that a certain return upon the ability to conceive and execute the project might be taken into consideration. But in the light of the context, this appears to be no more than a fair return upon the investment. The quotation follows: “As already remarked, the Southern Railway is the consolidation of numerous independent railroad properties. It has become through this process of growth a great railroad system embracing to-day a mileage of more than 6,000 miles. In this operation properties which were worthless have been put together to form a valuable whole. The physical condition of those properties has been enormously improved. The facilities afforded to their patrons have been increased. The whole territory involved must be benefited by this amalgamation, so far as its physical service is concerned. This enterprise is a perfectly legitimate one. The men who have conceived and executed it are entitled to a fair return upon the money which has been actually invested in it. They are entitled, in addition, to a reasonable profit on the ability to conceive and execute a project of this sort. They have no right to exact a return upon an extravagant capitalization, but whatever has honestly and in good faith and reasonably gone into this enterprise should be protected. On the other hand, the people in this territory are entitled to protection.”

⁴² Re Advances in Rates, Eastern Case, 20 I. C. C. 243.

⁴³ Danville v. Southern Ry., 8 I. C. C. Rep. 409.

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§ 976. Details of the present valuation.

In ascertaining the original cost to date of the properties of the railroads the Commission is instructed in the Act of 1913 in addition to such other elements as it may deem necessary to report upon the history and organization of the present and any previous corporation operating the roads. There must be ascertainment and report upon increases or decreases of stocks and bonds and the moneys or properties received therefor, and specifically the syndicating, banking and other financial arrangements under which such issues were made and the expense thereof. And furthermore, there must be investigation of the expenditure of all moneys by all these corporations and the purposes for which these expenditures were made in detail. Every railroad must furnish to the Commission maps, profiles, contracts relating to its construction and give the Commission free access to its accounts, records and memoranda. And unless otherwise ordered by the Commission with statement of the special reasons therefor, the records and data so collected by the Commission shall be open to the inspection and examination of the public. To what extent the original cost can be worked out from what papers there have been preserved of the many corporations which went out of existence so long ago, is problematical. In most of those cases the original investors were losers; and reorganization proceedings have covered over their losses. Indeed, there seems to be little doubt that if all the capital actually put into the construction of our railroads taken as a whole could be discovered it will be found that the present net earnings of the railroads, taken together, would make so moderate a per cent that the cry could never again be raised that our railroads are taking exorbitant profits.

§ 977. Finality of this valuation.

The Commission is instructed generally to give an analysis of the methods of valuation employed, and to ex-

plain the reasons for differences resulting from employing the differing bases indicated. As the Commission will have large sums at its disposal to employ experts in the field of valuation their report ought to go far toward clearing up the difficulties which have just been discussed. One may hope that out of this investigation may come at least an agreement as to the basis of valuation, and an understanding of the application of the principles determined: The Commission is to move with some caution, the first appraisals of a given property being regarded as tentative. It is open to any company reported to apply for special hearing in its own case. Should, however, the company let thirty days pass without protest after the appraisal has been served upon it the valuation is said to be final. And yet it is open apparently to the company to introduce in court proceedings, where this final valuation is brought in evidence, additional evidence as to the real valuation. Thereupon the new evidence is transmitted to the Commission for further examination; and their report thereon is to be final. And yet one wonders whether this is an ultimate finality. Can the power be taken from the courts to determine by what facts and under what theories one shall be deprived of his all by governmental bodies? Perhaps by the time this question comes to the courts of last resort people will feel that we should not expect to hold any rights, however fundamental, save at the disposal of the commissions set over us to take us in charge.

Topic D. Prohibition of Intercorporate Relationships

§ 978. Restraint of trade at common law.

In accordance with the doctrines in the common law from time immemorial against restraint of trade, any arrangements between carriers for pooling their business in any way must inevitably be held invalid as in restraint of trade, unless some distinction is taken by reason of the peculiarity of their situation. The most lucid state-

ment of the actual law is that of Mr. Justice Calwell, in one of the more recent Federal cases⁴⁴ where all relief was refused one party to an elaborate pooling contract against another for refusal to account according to its terms, upon these general principles thus succinctly stated: "A railroad company is a quasi-public corporation, and owes certain duties to the public, among which are the duties to afford reasonable facilities for the transportation of persons and property, and to charge only reasonable rates for such service. Any contract by which it disables itself from performing these duties or which makes it to its interest not to perform them, or removes all incentive to their performance, is contrary to public policy and void."⁴⁵

§ 979. Certain decisions support pooling.

However, there are a few cases which hold that pooling in public services instead of being peculiarly illegal, should really be regarded as truly in accordance with public interests, and therefore not against public policy. To this view many economists and some legists incline. Indeed, this seems to be the English law,⁴⁶ which is followed in a few American jurisdictions.⁴⁷ In the leading English case just cited, Vice Chancellor Wood dismissed the argument that the pooling agreement which was being questioned was against public policy by saying: "It is a mistaken notion that the public is benefited by pitting two railway companies against each other till one is ruined, the result being, at last, to raise the fares to the highest possible standard." Strong though this argument may be, it must address itself now to the legislative branch; the weight of authority against it at common law is overwhelming.

⁴⁴ *Chicago, M. & St. P. Ry. v. Wabash, St. L. & P. Ry.*, 61 Fed. 993, 9 C. C. A. 659.

⁴⁵ *Citing Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, 9 Sup. Ct. 553, 32 L. ed. 979; *Hooker v. Vande-*

water, 4 Denio, 349, 47 Am. Dec. 258.

⁴⁶ *Hare v. London & Northwestern Ry.*, 2 Johns. & H. 80.

⁴⁷ *Manchester & L. R. R. Co. v. Concord R. R.*, 66 N. H. 100, 20 Atl. 383, 9 L. R. A. 689.

§ 980. Pooling forbidden by the Commerce Act.

Any arrangement, oral or otherwise, or combination, which has for its purpose and eventuates in the pooling of freights of different and competing railroads, comes within the inhibition of the Act. The statute contemplates two methods of pooling, both of which are prohibited: First, a physical pool, which means a distribution by the carriers of property offered for transportation among different and competing railroads in proportions and on percentages previously agreed upon; and, secondly, a money pool, which is described best in the language of the statute, "to divide between them [different and competing railroads] the aggregate or net proceeds of the earnings of such railroads, or any portion thereof." The statute provides for the indictment not only of the carrier itself, but also of the officers individually where the carrier is a corporation, so that in such case both are indictable.⁴⁸ But apparently an agreement between railroads for a division of territory into which each may extend branch lines is not covered by the Act.⁴⁹

§ 981. Meaning of the Sherman Act.

The railroad pools were the first commercial combinations to feel the force of the Anti-trust Act of 1900; railroads, indeed, were indisputably engaged in interstate commerce. The Trans-Missouri Freight Association⁵⁰ was the first to be attacked. This was a railroad pool of the typical sort, providing for a distribution of traffic and a division of its freights upon a pro rata basis. Any arrangement of this kind plainly does away with real competition; and as such combinations have always been regarded as illegal at common law, it was plainly right to hold this pool a combination in restraint of trade within the words of the statute. Still the railway bar, arrayed

⁴⁸ *In re Pooling Freights*, 115 Fed. 588. N. O. & T. P. Ry., 4 Int. Com. Rep. 592, 6 I. C. C. 195.

⁴⁹ *Freight Bureau v. Cincinnati*, ⁵⁰ 166 U. S. 290.

now in behalf of its own patrons, made a desperate attack upon the application of the statute. But the Supreme Court, now become more sophisticated, held that, as the direct effect of this combination was to control competition in transportation between the States, its continuance constituted a plain restraint of interstate commerce. A little later the case of the Joint Passenger Traffic Association ⁵¹ came on for disposition. The draftsmen of that agreement had seen to it that the pooling did not go so far as formerly, and indeed, out of abundant caution, had put in a clause that nothing therein should be construed as in violation of the anti-trust law. But, as the substance of competition was really touched by the agreement, the Supreme Court said that this pool, too, should be dissolved for its direct restraint of interstate commerce.

§ 982. Extent of the Clayton Amendments.

By the Clayton Act of 1914, jurisdiction to enforce compliance with certain sections so far as carriers subject to the Act are concerned is vested in the Commission. For instance, there is the section providing that no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition; and that no corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations. But by explicit proviso nothing therein contained shall be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in

⁵¹ 171 U. S. 505.

the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other such common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

§ 983. Provisions of the Panama Act.

In the Panama Act of 1912 there was included an amendment to section 5 of the Act to Regulate Commerce to the effect that after July 1, 1914, it shall be unlawful for any railroad company or other common carrier subject to the Act to Regulate Commerce to own, lease, operate, control, or have any interest whatsoever (by stock ownership or otherwise, either directly, indirectly, through any holding company, or by stockholders or directors in common, or in any other manner) in any common carrier by water with which said railroad or other carrier aforesaid does or may compete for traffic or any vessel carrying freight or passengers upon said water route or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic. Jurisdiction was conferred on the Commission to determine questions of fact as to the competition or possibility of competition, after full hearing, on the application of any railroad company or other carrier. If the Commission shall be of the opinion that any such existing specified service by water other than through

the Panama Canal is being operated in the interest of the public and is of advantage to the convenience and commerce of the people, and that such extension will neither exclude, prevent, nor reduce competition on the route by water under consideration, it may, by order, extend the time during which such service by water may continue to be operated beyond July first, nineteen hundred and fourteen. In every case of such extension the rates, schedules, and practices of such water carrier shall be filed with the Interstate Commerce Commission and shall be subject to the Act to Regulate Commerce and all amendments thereto in the same manner and to the same extent as is the railroad or other common carrier controlling such water carrier or interested in any manner in its operation.

§ 984. Examples of pooling arrangements.

Railway companies which enter into an association to control traffic to a common market, and maintain rates higher than are reasonable, unjustly prejudicial, and preferential, if not jointly liable, are at least severally liable under this provision; and the "fines" or "penalties" imposed by the provisions of the agreement of the Southern Railway & Steamship Association on members for violation of association rules appear on the face of that agreement to be available as substitutes for payment which would be exacted under a regular pooling system, and the arrangement under which they are imposed is tantamount to a combination, contract, or agreement "for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads or any portion thereof," which are forbidden by the statute.⁵² In one recent investigation an agreement between the New Haven and the New York Central was discussed, and the conclusion was reached that, as this guaranty of earnings did away with any

⁵² Freight Bureau v. Cincinnati, N. O. & T. P. Ry., 4 Int. Com. Rep. 592, 6 I. C. C. 195.

incentive to competition, it was within the prohibition of the Act of Congress.⁵³ The mere fact that an advance in rates is the product of an unlawful combination by interstate carriers will not justify the Commission in setting aside such rate if not unreasonably high.⁵⁴ At all events, power to deal with pooling by proceedings directed against it was not given to the Commission when pooling was made illegal by the Act originally.⁵⁵

§ 985. Certain agreements held valid.

The Commission has held that it is at least doubtful whether section 5 of the Act applies to a practice whereby the transportation of immigrants from Atlantic ports westward is divided between the carriers in agreed proportions based upon the proportion of the domestic passenger traffic done by each line, where such a practice cannot be made effective in respect to any other class of passenger business, and the immigrants are carried at domestic published rates, and the arrangements adopted by the carriers in connection with the immigration authorities of the United States have efficiently promoted the protection and greatly improved the treatment and comfort of immigrants.⁵⁶ Certain transcontinental carriers adopted as part of an agreement for a through rate from California to the East, for oranges and other citrus fruits, a rule under which the right of routing beyond its own terminal is reserved to the initial carrier as the condition of guaranteeing the through rates to the shipper. The initial carrier promised fair treatment to the connecting lines, and carried out such promise, but there was no agreement to give any specific amount of tonnage to any particular connecting line. The rule was intended to break up rebating by the connecting lines, and, in its practical

⁵³ New England Investigation, 27 I. C. C. 560.

⁵⁴ Tift v. Southern Ry. Co., 10 I. C. C. Rep. 548.

⁵⁵ China & Japan Trading Co. v. Georgia R. Co., 12 I. C. C. 236.

⁵⁶ Re Transportation of Immigrants from New York, 10 I. C. C. Rep. 13.

operation, the actual routing was generally conceded to the shipper, and his requests to divert shipments *en route* were usually allowed. It was held by the Supreme Court that this was not a pooling of freights such as is forbidden by the Act.⁵⁷ In a later proceeding as to passenger arrangements for handling certain matters of administration jointly, it was held that the manner of dividing validation fees did not constitute violation of section 5.⁵⁸

⁵⁷ *Southern Pacific Co. v. Interstate Commerce Commission*, 200 U. S. 536, 26 Sup. Ct. 330. ⁵⁸ *Riter v. O. S. L. R. R.*, 19 I. C. C. R. 443.

BOOK IV

POWERS OF THE COMMISSION

CHAPTER XXI

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§ 990. Provisions of the Act.

The Interstate Commerce Commission provided for in section 24 in 1906, is composed of seven commissioners, who are appointed by the President for seven-year terms, by and with the advice and consent of the Senate. Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. Not more than four of the commissioners shall be appointed from the same political party according to section 11. No person in the employ of or holding any official relation to any common carrier subject to the provisions of this Act, or owning stock or bonds thereof, or who is in any manner pecuniarily interested therein, shall enter upon the duties of or hold such office. The Commissioners shall not engage in any other business, vocation, or employment. No vacancy in the Commission shall impair the right of the remaining commissioners to exercise all the powers of the Commission. The principal office of the Commission is at Washington, where its general sessions are held; but whenever the convenience of the public or the parties may be promoted or delay or expense prevented thereby, the Commission may hold special sessions in any part of the United States. And it may, by section 19, by one or more of the commissioners, prosecute any inquiry necessary to its duties, in any part of the United States, into any matter or question of fact pertaining to the business of any common carrier subject to the provisions of this Act. By section 12 the Commission shall have authority to inquire into the management of

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the business of all common carriers subject to the provisions of this Act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created. Furthermore, the Commission is authorized and required to execute and enforce the provisions of this Act; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this Act and for the punishment of all violations thereof.

§ 991. Power to investigate rates.

Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, charge, or classification, or regulation or practice affecting any rate or charge, the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders, without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, fare, charge, classification, regulation, or practice. Pending such hearing and the decision thereon, the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than one hundred and twenty days. After full hearing, whether completed before or after such changes go into effect, the Commission may make such order in reference thereto

as would be proper in a proceeding initiated thereafter. If any such hearing cannot be concluded within the period of suspension, as above stated, the Commission may, in its discretion, extend the time of suspension for a further period not exceeding six months. At any such hearing involving a rate increase, the burden of proof to show that the increased rate is just and reasonable shall be upon the common carrier; and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it. And for the purposes of the Act the Commission is given power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation. Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing; and in case of disobedience to a subpoena the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States.

Topic A. Basis of Commission Regulation

§ 992. Regulation of rates by the State.

The basis of the right of the State to regulate the rates of public-service companies is the principle first clearly apprehended and expressed by Lord Hale in his treatise *De Portibus Maris*,⁵⁹ that when property is affected with a public interest it ceases to be *juris privati* only. Property, as Chief Justice Waite⁶⁰ said in relying upon this ancient rule so often cited, does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest he, in effect, grants to the

⁵⁹ Cited in *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77.

⁶⁰ Quoted from *Munn v. Illinois*, *supra*.

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public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. The power of the State over public service employments is not limited to its power to pass on the reasonableness of rates after they have been established; the power to initiate action, to fix rates in the first instance by way of regulating action, is fully recognized at common law and by the general practice of all common-law countries.

§ 993. Ways in which power is exercised.

The right of the State to regulate those businesses in which the public has an interest has come down to us from time immemorial. Legislation laying down rules in first instance for the course which those who assume these callings must follow has always been regarded as due process of law, if it kept within the bounds of what is rational. All this was fully recognized in the Granger cases⁶¹ in disposing of the contention strongly urged that the power over rates was essentially judicial, and could not be exercised by the legislature. But the court in its line of argument in these cases fully justified regulation in every way that the State may employ to impose obligations. Litigation determines rights and wrongs in the past upon the basis of an existing law; legislation prescribes rules for the future as to what shall henceforth be the right and wrong in a given situation. Declaring past charges unreasonable is an act judicial in its character; fixing rates for the future on the other hand partakes of legislation. The function of the government is that of regulation of the conduct of the business; the Commission should not go into the management of the business by unnecessarily dictating as to the exact course which should be pursued.⁶²

⁶¹ 94 U. S. 113.

v. Smith, 173 U. S. 684, 19 Sup. Ct.

⁶² Note the limitations upon this doctrine in *Lake Shore & M. S. Ry.* 565.

§ 994. Power to pass on reasonableness of rates.

The earliest form in which the power to regulate rates was exercised, is that adopted by the common law, that in the case of the courts, granting a rate charged by a carrier unreasonable upon suit of the party who has been charged, and to pay it. Such power has been exercised by the courts of common law from the beginning of their history.⁶⁵ It has always been recognized that if a carrier attempted to charge a shipper an unreasonable sum, the courts had jurisdiction to inquire into that matter, and to award to the shipper any amount charged from him in excess of a reasonable rate.⁶⁶ This power, which has aptly been called a vitatorial power of the State,⁶⁷ is only one example of the general power of the State to oversee the acts of those who are engaged in its public service, and to make sure that they really serve the public interest. However, in some States where the division of powers is not strictly insisted upon in the Constitution, it has been held that the power to fix rates may be conferred upon inferior courts, with appeal to the superior courts in regular session.⁶⁸

§ 995. Duty of the courts to pass on reasonableness of rates.

To whatever body the power of fixing rates may be confided, it is the function of the regular courts to pass upon the reasonableness of the rates thus established; and the courts cannot be deprived of this power. The question of reasonableness cannot be so conclusively determined by the legislature of the State, or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry.⁶⁹ Under our constitutions, the

⁶⁵ Railroad Commission Cases, 116 U. S. 307, 20 L. ed. 636, 6 Sup. Ct. 334.

⁶⁶ Reagan v. Farmers' L. & T. Co., 154 U. S. 302, 38 L. ed. 1014, 14 Sup. Ct. 1047.

⁶⁷ Brymer v. Butler Water Co.,

179 Pa. 231, 36 Atl. 249, 36 L. R. A. 260.

⁶⁸ Troutman v. Smith, 105 Ky. 231, 48 S. W. 1084.

⁶⁹ Reagan v. Farmers' L. & T. Co., 154 U. S. 362, 38 L. ed. 1014, 14 Sup. Ct. 1047.

legislature cannot delegate its power, and a Commission authorized by statute to determine and declare what are reasonable rates, and to fix schedules of rates which shall be the lawful rates, acts as an administrative and not as a legislative body. A court may, therefore, enjoin the promulgation by it of any particular schedule whenever essential to the ends of justice.⁶⁸ The fact, however, that the Commission is given not merely the power to fix rates, but also (as is the case with the Interstate Commerce Commission) the power to hear controversies between parties, does not make its organization unconstitutional, provided the power of passing on the validity of its rates is not withdrawn from the ordinary courts.

§ 996. Fixing rates by administrative commissions.

The commonest way at present of fixing rates is to commit it to an administrative commission; and this may be legally done.⁶⁹ Notwithstanding any theoretical division of the powers of government, our books have at all times been full of statutes, unquestionably valid, in which the legislature, after laying down rules and principles, has been content to leave the execution and detail to other officers. The requirement that the rate shall be reasonable is to be found in the law of the land which can only be modified by the process we call legislative.⁷⁰ But the function of regulating commissions in determining and fixing reasonable rates and practices, within the principles and limitations of the substantive law governing the situation, is what we call administrative. As a matter of government it has been found, particularly of late years, that the only practicable way of enforcing the elaborated law of public service is by the creation of administrative bodies specially empowered for this particular work.⁷¹ In-

⁶⁸ *Central of Ga. Ry. Co. v. Railroad Commission of Ala.*, 161 Fed. 925.

⁶⁹ See the *Railroad Commission Cases*, 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. 334.

⁷⁰ See in *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 38 L. ed. 1014, 14 Sup. Ct. 1047.

⁷¹ *Louisville & N. R. R. v. Brown*, 123 Fed. 946.

deed with the increasing complexity of our relations the power of the legislature to act through bodies skilled to meet the exigencies of the situation as they arise has been universally recognized.⁷²

§ 997. Nature of their powers.

When the legislative power is concerned with administrative affairs, the power may be as fully exercised by the Commission which is raised for that purpose as the legislature might have exercised it, subject to any limitations imposed by the legislature itself. Under this rule the power vested in the Interstate Commerce Commission to fix rates for the future was held constitutional.⁷³ And nothing in the federal Constitution or statutes prevents a State from creating a board of railroad commissioners and in fixing their powers over railroad corporations, providing that competing lines shall so remain.⁷⁴ A State statute which authorized a railroad commission to hear complaints and fix just rates is invariably held not unconstitutional on the ground that it confers judicial powers upon the Commission. As the court said in one case the Constitution was not intended to prevent either the legislature or the railroad commission from investigating and finding out the facts.⁷⁵ The State has the right, as a general proposition, to prescribe the compensation a railroad shall receive for carrying passengers and freight within its borders; and the State may supervise railroads, and regulate their charges through a Commission. So, too, the State may give the Commission power to rectify abuses in rates, and grant reparation.⁷⁶ Of course, an act creating a board of railroad commissioners with power to

⁷² See, for instance, *Attorney-General v. Chicago & N. W. Ry.*, 35 Wis. 425. State, 210 U. S. 187, 52 L. ed. 1016, 28 Sup. Ct. 650.

⁷³ *Louisville & N. R. R. Co. v. Interstate Commerce Commission*, 184 Fed. 118. ⁷⁵ *Louisville & N. R. R. v. Siler*, 186 Fed. 176.

⁷⁴ *Mobile, J. & K. C. R. Co. v.* ⁷⁶ *Stone v. Natchez R. R.*, 62 Miss. 646.

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regulate and control the operation of common carriers is not invalid because the constitution does not specifically provide for the creation of railroad commissioners.⁷⁷ It is well recognized to-day that the legislature has the right to supervise, regulate and control rates and conduct of common carriers, either directly or through commissions.⁷⁸

§ 998. Delegation of rate-making power.

It has already been seen that the rate-making power may be delegated to a subordinate body, whether municipal corporation or commission; and this is not unconstitutional as a delegation of legislative power. The legislative act of requiring the rates to be reasonable is either the act of the common law or is part of the act by which the delegation of authority is conferred. The functions of such bodies in determining and fixing reasonable rates are administrative rather than legislative. The authority conferred on them relates merely to the administration in practice of the general rules laid down by the common law and by the legislature. As was said in *Chicago & Northwestern Railway v. Dey*,⁷⁹ there is no inherent vice in such a delegation of power; nothing in the nature of things which would prevent the State by constitutional enactment, at least, from intrusting these powers to such a board; and nothing in such constitutional action which would invade any rights guaranteed by the federal Constitution. As another illustration of the extensive operation of the fundamental principles under discussion, the case of *State v. Great Northern Railway*,⁸⁰ may be taken; it was held in that case that for the legislature to leave to a commission the power to pass upon the issuance of securities without giving it any rules to guide it in its action was an unconstitutional delegation of power.

⁷⁷ *State v. Mo. Pac. R. R.*, 76 Kans. 467, 92 Pac. 606.

⁷⁹ 35 Fed. 866.

⁷⁸ *Corporation Commission v. Railroad*, 127 N. C. 288.

⁸⁰ 100 Minn. 445, 111 N. W. 289.

§ 999. Limitations of the principle.

The fundamental rule against delegation of legislative power remains; but it is realized that the application of the principle laid down by the legislature is simply administration.⁸¹ Very recently this distinction was clearly made in the Supreme Court in the case of *Interstate Commerce Commission v. Goodrich Transit Company*,⁸² where the objection was raised in vain that certain orders of the Commission relating to accounting created in effect new obligations not imposed by the statute. The Congress may not delegate its purely legislative power to a commission, said the Supreme Court, but having laid down the general rules of action under which a commission shall proceed it may require of that commission the application of such rules to particular situations, and the investigation of facts with a view to making orders in a particular matter within the rules laid down by Congress. In section 20 Congress has authorized this Commission to require annual reports, and the Act itself prescribes in detail what these reports shall contain. In other words, Congress has laid down general rules for the guidance of the Commission, leaving to it merely the carrying out of details in the exercise of the power so conferred. This, as the court concluded in the still more recent case of *Kansas City Southern Railway v. United States*,⁸³ is not a delegation of legislative power; it is proper administration of a general statute, proceeding upon the principles therein laid down.⁸⁴

Topic B. Administrative Functions of the Commission

§ 1000. Nature of the Commission.

Under the commerce clause of the Constitution, Con-

⁸¹ In the recent case of *Louisiana & P. R. R. v. United States*, 209 Fed. 244, it was pointed out that for a commission to draw up what would amount to a code applicable to a situation would be to transcend its

powers, its true function being administrative, not legislative.

⁸² 224 U. S. 194, 32 Sup. Ct. 436.

⁸³ 231 U. S. 433, 34 Sup. Ct. 125.

⁸⁴ See also *State v. Yazoo R. R.*, 62 Miss. 607.

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gress has the power to create a Commission for the purpose of supervising, investigating, and reporting upon matters or complaints connected with or growing out of interstate commerce.⁸⁵ By the acts of Congress creating the Commission, providing that it shall have an official seal and making it lawful for it to apply by petition for the enforcement of its orders, this Commission is made a body corporate with legal capacity to be a party plaintiff or defendant in the federal courts.⁸⁶ The Commission is a special tribunal whose duties, though largely administrative, are sometimes semi-judicial; but it is not a court empowered to render judgments and enter decrees.⁸⁷ And in general it may be said that the Commission created to enforce the Act to Regulate Commerce is so clearly within the scope of the principles which have just been discussed that the legality of the functions intrusted to it cannot be questioned in point of constitutionality if properly exercised.

§ 1001. Functions of the Commission.

The Commission itself in speaking of the basis of its powers has often said that it is an administrative body.⁸⁸ It has pointed out that it is not a court, although its proceedings partake somewhat of a judicial or semi-judicial character.⁸⁹ As the Commission is an administrative body, although it need not at first determine that the subject-matter is within its jurisdiction, it will not assume to grant affirmative relief unless its jurisdiction is definitely ascertained.⁹⁰ Since the Commission is not a court, it may consider it its function to so apply the

⁸⁵ *Kentucky & I. Bridge Co. v. Louisville & N. R. R.*, 37 Fed. 567, 2 L. R. A. 289, 2 Int. Com. Rep. 351.

⁸⁶ *Texas & P. Ry. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. ed. 940, 16 Sup. Ct. 666, 5 Int. Com. Rep. 405.

⁸⁷ *Toledo Produce Exchange v.*

Lake Shore & M. S. R. R., 3 Int. Com. Rep. 830.

⁸⁸ *Mattison v. P. Co.*, 23 I. C. C. 233.

⁸⁹ *Freeman Lumber Co. v. St. L., I. M. & S. Ry.*, 20 I. C. C. 612.

⁹⁰ *Corporation Commission of Oklahoma v. A., T. & S. F. Ry.*, 25 I. C. C. 120.

Act as to protect public interests.⁹¹ The theory upon which the Commission proceeds is that the Act makes it a special administrative tribunal clothed with power to hear and determine causes of action involving rights which have long existed at common law.⁹² The Commission derives all its powers from statute; and it can exercise no powers not granted by the Act.⁹³ And it could not investigate any action of a carrier committed prior to the time when the Act went into effect.⁹⁴

§ 1002. Basis of its powers.

It will be seen, therefore, that the Commission has no general power to manage the business of carriers.⁹⁵ So it has no authority to control commissioners of immigration, and cannot do so indirectly by inhibiting railroad companies from carrying out arrangements made by them with the commissioners.⁹⁶ It formerly had no power to grant redress for the failure of a carrier to comply with its common-law duty to furnish cars.⁹⁷ Indeed at that time it had no power over service as such at all.⁹⁸ So the Act did not originally confer upon the Commission authority to make an order affirmatively requiring a railway carrier to deliver carloads of interstate freight to a connecting carrier.¹ Nor could it determine the right of milling in transit.² The Commission until granted jurisdiction could not inquire whether railroad companies act

⁹¹ *In re Advances in Rates, Western Case*, 20 I. C. C. 307.

⁹² *Hussey v. C., R. I. & P. Ry.*, 13 I. C. C. 366.

⁹³ *Holbrook v. St. Paul, M. & M. Ry.*, 1 Int. Com. Rep. 323.

⁹⁴ *White v. Michigan Cent. R. R.*, 2 Int. Com. Rep. 641.

⁹⁵ *Traders & Travelers Union v. Phila. & R. R. R.*, 1 Int. Com. Rep. 371.

⁹⁶ *Savery v. New York C. & H. R. R.*, 2 Int. Com. Rep. 210.

⁹⁷ *Re Transportation of Fruit*, 10 Int. Com. Rep. 360.

⁹⁸ *Scofield v. Lake Shore & M. S. R. R.*, 2 Int. Com. Rep. 67; *Rice v. Cincinnati, W. & B. R. R.*, 3 Int. Com. Rep. 841.

¹ *Railroad Commission of Kentucky v. Louisville & N. R. R.*, 10 Int. Com. Rep. 173.

² *Diamond Mills v. Boston & M. R. R.*, 9 Int. Com. Rep. 311.

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wisely or unwisely, fairly or unfairly, between themselves in forming lines, and establishing differentials; but its inquiry was limited to the question whether the situation created by the companies violated the Act.³

§ 1003. Limitations upon its jurisdiction.

Some specific illustrations of the limitations upon the jurisdiction of the Commission will make these principles plainer. In *re Transportation of Fruit*,⁴ the Commission pointed out that it had no such extensive power over carriage in general as to justify it in going to the length of or making orders concerning the grade of service which should be rendered. In *Spokane v. Northern Pacific Railway*,⁵ the Commission held that what was the capitalization of the carrier or how it was created, whether it was fully paid in or in large part water, were matters with which the Commission had no concern; and in a later proceeding between the same parties the Commission added that it had no jurisdiction over what dividends a railroad corporation might properly pay. In *Joynes v. Pennsylvania Railroad*,⁶ the Commission said squarely that section 15 relating to the process for giving relief of violation of the Act was the dominating and controlling expression of the real object and meaning of the Act; it makes the Commission a special expert body to deal with rates and practices affecting rates, not a body to take the place of courts in giving relief for wrong doing by carriers in general. In the *Advances in Rates Cases*,⁷ it was again observed that the Commission had no jurisdiction to deal with the questions of capitalization and profits as such; it was said that the Commission had no authority to say what a railroad ought to earn, or upon what capitalization it might pay returns, either as a matter of right or

³ *New York Produce Exch. v. Baltimore & O. R. R.*, 7 Int. Com. Rep. 612.

⁴ 10 I. C. C. 360.

⁵ 15 I. C. C. 326.

⁶ 17 I. C. C. 361.

⁷ 20 I. C. C. 243.

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as a matter of public policy; except in so far as these figures related to the power of the Commission over rates, it had no power otherwise over financial operations good or bad, or over profit or loss.

§ 1004. Extent of its supervision.

In view of these rulings it is obvious that the Commission will not go out of its way to assert jurisdiction over matters clearly not confided to it. Thus in *Sprigg v. Baltimore & Ohio Railroad*,⁸ it was said that the Commission will not attempt to administer generally all Federal statutes to the conduct of railroads, such as, for instance, the anti-trust law. In *Consolidation Fuel Co. v. Atchison, Topeka & Santa Fe Railway*,⁹ it was pointed out that the Commission has not been charged with the enforcement of the commodities clause in section 1 of the Act itself, beyond the general duty of calling attention to any infraction of the provisions of the Act. In *Railroad Commission v. Louisville & Nashville Railroad*,¹⁰ it was held that the Commission could not without usurpation of authority enforce State laws or the provisions of State constitutions. And in *Southwestern Produce Distributors v. Railroad*,¹¹ it was added that the Commission's jurisdiction, in a general sense, extends only to relations between the carriers and passenger and carrier and shipper.

§ 1005. Visitorial powers in general.

There have been important cases of late years in the courts relating to the principles under discussion. It has, of course, long been well established that the State may supervise railroads, and regulate their affairs through a Commission.¹² Such a Commission in its general supervisory powers may require reports of the whole businesses of the carrier so far as the information desired has a bear-

⁸ 8 I. C. C. 443.

⁹ 27 I. C. C. 554.

¹⁰ 10 I. C. C. 173.

¹¹ 20 I. C. C. 458.

¹² *Railroad Commission Cases*, 116 U. S. 307, 6 Sup. Ct. 344.

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ing upon matters put within its jurisdiction.¹³ It has been pointed out, however, by the Supreme Court in speaking of the federal Commission that railroads are the private property of their owners; and while from the public character of the work in which they are engaged the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and communities, yet in no sense proper is the public a general manager.¹⁴ Thus it would seem to be fundamental, as a State court has recently said in refusing to permit its own commission to go too far into detail in its orders, that, while a commission has power to require every railroad company to discharge all its public duties, whether imposed by charter, general law, or the nature of its business, its powers are only those of supervision and regulation—not of management and control.¹⁵ By observing this distinction a commission would not go so far as to take away from the owners the operation of their properties.

§ 1006. What supervision implies.

The Commission has at times taken the point of view that its powers are inherently limited to those of supervision. The Act leaves carriers free to initiate their own policies and regulations; the jurisdiction of the Commission is to revise what the carriers are doing.¹⁶ Thus the Commission cannot place limitations on railroad expenditures, nor direct improvements, nor enforce economies, no matter what revenue may be received.¹⁷ The Commission does not sit as a supreme traffic manager for the railroads of the country; power to direct the policy which they may pursue is not a matter delegated to it, so long as such policy does not infringe upon the prohibitions of

¹³ *People v. Chicago I. & L. Ry.*, 223 Ill. 581, 79 N. E. 144.

¹⁴ *Interstate Commerce Commission v. Chicago Gt. W. Ry.*, 209 U. S. 108, 28 Sup. Ct. 493.

¹⁵ *Bacon v. Boston & M. R. R.*, 83 Vt. 421, 76 Atl. 128.

¹⁶ *Traer v. C., B. & Q. R. R.*, 14 I. C. C. 165.

¹⁷ *In re Advances in Rates, Western Case*, 20 I. C. C. 307.

the law.¹⁸ Nor has the Commission power to say what shall be done, as a matter of public policy, except in so far as the public will must always be considered in exercising its authority under the Act. Its duty with respect to rates is, therefore, simply to inquire whether they are in accordance with the requirements of the Act.¹⁹

§ 1007. Status of the Commission.

To invest an administrative body like this Commission with unrestricted and unguided authority would be to give it legislative power, which cannot be done under our federal Constitution. Congress, instead of making rates itself, laid down certain rules which its administrative representatives must follow; and the Commission may take into consideration those various circumstances which properly would have acted upon the mind of the legislature in determining upon proper rates.²⁰ It is one thing to authorize such a body to administer the law in accordance with certain rules and standards prescribed by the legislature, and an entirely different thing to turn over to it the exercise of the legislative discretion itself.²¹ Since the Commission is an administrative body, it may not by interpretation annul an act of Congress.²² And no holding of the Commission can render lawful that which is of itself unlawful.²³ On the other hand, the courts have no power to fix railroad rates, that power being vested in the Commission; and where the Commission acting in its administrative capacity establishes certain rates, the courts will not interfere unless some constitutional or natural right has been violated.²⁴ Congress did not in the Act

¹⁸ *In re Advances on Coal to Lake Ports*, 22 I. C. C. 604.

¹⁹ *Albree v. B. & M. R. R.*, 22 I. C. C. 303.

²⁰ *Railroad Commission of Nevada v. S. P. Co.*, 21 I. C. C. 329.

²¹ *City of Spokane v. N. P. Ry. Co.*, 21 I. C. C. 400.

²² *In re Pipe Lines*, 24 I. C. C. 1.

²³ *Nebraska-Iowa Grain Co. v. U. P. R. R.*, 15 I. C. C. 90.

²⁴ *Philadelphia & R. Ry. v. Interstate Commerce Commission*, 174 Fed. 687.

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and its amendments intend to vest administrative authority in the courts in the matter of fixing rates, but on the contrary committed the power to ascertain facts, and determine what is reasonable in regard to rates in view of such facts, to the Commission.²⁵

Topic C. Authority to Investigate Conditions

§ 1008. Investigation by the Commission.

There has been no doubt in the mind of the Commission from the very beginning, that it may investigate any supposed violation of the Act, even on its own motion.²⁶ Thus long before it had any powers in relation thereto it inquired as to division of alleged unlawful joint rates.²⁷ And it held that its jurisdiction in this respect extends to a case of alleged unlawful prejudice and disadvantage to shippers of freight through the enforcement by carriers of regulations.²⁸ As the Act applies to the transportation of export and import traffic, the jurisdiction of the Commission over the course of all such traffic has always been clear.²⁹ That the Commission may investigate any matters connected with the performance of transportation by carriers is seldom denied; and so long as the inquiry is confined to the officers of the company and the records of the company, it may well be that this is within the power of regulation of carriage subject to the Act. In *Re Rates on Food Products*,³⁰ the Commission claimed that it might enforce production of books of the carriers investigated. Although in *Re Grand Trunk Railway*,³¹ the Commission said that it might on its own motion investigate supposed violations of Act, it did not go to the

²⁵ *Louisville & N. R. R. v. Interstate Commerce Commission*, 184 Fed. 118.

²⁶ *Re Atlanta & W. P. R. R.*, 2 Int. Com. Rep. 461.

²⁷ *Warren-Ehret Co. v. Central Ry. of New Jersey*, 8 Int. Com. Rep. 598.

²⁸ *Cincinnati Chamber of Commerce and Merchant's Exchange v. Baltimore & O. S. W. Ry.*, 10 Int. Com. Rep. 378.

²⁹ *Re Export and Domestic Rates on Grain*, 8 Int. Com. Rep. 214.

³⁰ 3 Int. Com. Rep. 151.

³¹ 2 Int. Com. Rep. 496.

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extent of claiming that it could compel testimony in such investigations from anyone in the United States who might have knowledge of the facts.

§ 1009. Limitation of its scope.

The Commission has declared frequently that its powers are confined to the enforcement of the Act, and do not extend to investigation of corporations generally. In *China & Japan Trading Co. v. Georgia Railroad* ³² is the significant statement that the Commission has no power to enforce the law generally as to the duties of carriers broadly speaking. In the *Commutation Rate Case*,³³ it was pointed out that in sections 1, 2, 3, 4, and 15 are contained all the substantive law and machinery for public regulation of interstate carriers which the Commission possesses. In the opinion in the case entitled the *New England Investigation* ³⁴ the Commission urged that the time had come when the national government should assume jurisdiction over railroads in so far as may be necessary to secure to the public proper service, saying that the Commission has fairly complete control over rates and over all practices which relate to the rate, but as yet no control whatever over the operation of the railroad or its physical maintenance. And as to the matter of expenditure and capitalization it has lately made several recommendations at the end as to powers which it felt ought to be added to its jurisdiction, as for instance in the *St. Paul and Puget Sound Accounts*.³⁵

§ 1010. Jurisdiction of the federal Commission.

The extent to which a concern which has business subject to the Act is subject to being investigated as to other business carried on by it was brought out sharply in the recent case of the *Interstate Commerce Commission v. Goodrich Transportation Company*.³⁶ The defendant had

³² 12 I. C. C. 241.

³³ 21 I. C. C. 428.

³⁴ 27 I. C. C. 560.

³⁵ 30 I. C. C. 280.

³⁶ 224 U. S. 194, 32 Sup. Ct. 436.

a line of steamers carrying freight and passengers on the Great Lakes and was a party to joint rail and water rates. Its business was of various sorts: (1) intrastate water transportation; (2) interstate water transportation; (3) intrastate joint water and rail transportation; and (4) interstate joint water and rail transportation. The Commission ordered this line (1) to keep accounts in same form as railways did; (2) to report all its business, both interstate and intrastate; (3) to make same reports as a railway; (4) to include receipts from certain amusement park the business of which was entirely intrastate. The Supreme Court sustained the order of the Commission *in toto*, saying that in order to regulate the interstate part of the business it must know it as a whole. And it is obvious that otherwise it would be impossible to tell whether reports as to interstate business were correct, as the accounts could be juggled between different books. In order to have effective regulation of interstate business there must be power to examine everything involved therewith, so reports may be required to both interstate and intrastate, public and private. This was brought out very clearly in another case, *United States ex rel. v. Union Stockyards and Transit Company*,³⁷ recently decided by the Supreme Court in which the jurisdiction of the Commission over each and all of a congeries of corporations only one of which could be said to be directly engaged in interstate commerce.

§ 1011. Extent of its powers.

The Commission should not, however, attempt to extend its supervision over matters with which it can have no concern. Thus the Commission has no jurisdiction to determine whether the rights of a minority stockholder in one railroad absorbed by another have been infringed, where the purpose of the proceeding before the Commission is to obtain information for the complainant to determine whether, as a stockholder, it would be advisable

³⁷ 226 U. S. 286, 33 Sup. Ct. 83.

to bring a suit in equity for an accounting against the railroads involved.³⁸ Breaches of duty by a carrier otherwise than in relation to matters covered by the Act are wholly within the jurisdiction of the courts.³⁹ The Commission has often said that it has no common-law or equity jurisdiction to adjust matters between parties, but only such authority over matters relating to service of the public as are prescribed in the Act.⁴⁰ It follows that under no head of jurisdiction can this Commission take action in regard to the private rights and wrongs whether falling under the head of tort or contract.⁴¹ Any jurisdiction which the Commission has had heretofore in respect to the subject-matter covered by the anti-trust law has been altogether confined to the effect of the combination alleged, if any, in raising rates to an unreasonable level.⁴² The Commission is a body of limited powers derived exclusively from the Act; it is a purely administrative body charged with specific administrative duties and invested with specific powers.⁴³ Although the Act may be described as a general code for the regulation and government of railroads upon the subjects treated of therein, it cannot be contended that it covers all cases concerning transportation by railroad; and it does not purpose to cover any such extensive field.⁴⁴

§ 1012. Powers of State Commissions.

Some cases in the State courts of late years which have been liberal in support of the right of their commissions to supervise carriers in all their ways should be noted, however. It is natural to permit an administrative board, created to supervise quasi-public corporations to inquire

³⁸ *Manning v. C. & A. R. R.*, 13 I. C. C. 125.

³⁹ *Blume & Co. v. Wells, Fargo & Co.*, 15 I. C. C. 53.

⁴⁰ *Hillsdale Coal & Coke Co. v. D. & T. Ry.*, 19 I. C. C. 356.

⁴¹ *Ralston Townsite Co. v. Mo. Pac. Ry.*, 22 I. C. C. 354.

⁴² *Warren Manufacturing Co. v. So. Ry.*, 12 I. C. C. 381.

⁴³ *Kentucky Bridge Co. v. L. & S. R. R.*, 37 Fed. R. 567.

⁴⁴ *United States v. Transmission Freight Ass'n*, 166 U. S. 290, 43 L. ed. 259, 19 Sup. Ct. 85.

in a purely administrative way into the affairs and papers of such corporations subject to its jurisdiction; but it would be going to an extreme to permit such administrative inquiries to be extended into the affairs and papers of those private institutions with which the railroad company may do business. The right of the commission to inquire into the affairs of the carriers is strongly stated in some of these cases, but there is no suggestion that people can generally be compelled to testify as to their dealings of every sort with any carriers.⁴⁵ In regard to the scope of supervision the cases in the States have been very strong; thus it has been said that the action of a railroad commission in requiring reports was so within its administrative power that no appeal lay to the courts, as it would in a matter quasi-judicial.⁴⁶ In another case⁴⁷ the power of a State commission to require that all the accounts of the carrier relating to every phase of its business, interstate as well as intrastate, should be kept in such ways as should be prescribed was asserted. In still another case⁴⁸ the distinction between a general investigation and a quasi-judicial proceeding was clearly set forth; and the impropriety of enforcing duties as the result of a mere investigation was pointed out.

§ 1013. Proceedings belonging in the courts.

The Commission is not vested with jurisdiction over suits to recover damages for delay in the delivery of interstate shipments, so as to prevent the State courts from entertaining such actions; common-law actions of this sort even between carrier and shipper where the commerce is interstate still belong in the courts of law of the States or what otherwise would be normally the venue.⁴⁹

⁴⁵ *People v. Chicago, I. & L. Ry.*, 223 Ill. 581, 79 N. E. 144.

⁴⁶ *St. Louis & S. F. Ry. v. State*, 24 Okla. 805, 105 Pac. 351.

⁴⁷ *Railroad Commission v. Texas*

& *P. Ry.* (Tex. Civ. App.), 140 S. W. 829.

⁴⁸ *In re Railroad Commissioners*, 79 Vt. 53, 64 Atl. 233.

⁴⁹ *Pittsburg, C., C. & St. L. Ry. Co. v. Knox*, 177 Ind. 344, 98 N. E. 295.

The Commission is given jurisdiction only to hear complaints in regard to impropriety in rates; and the language of the Act in reference to complaints to the Commission must be construed as relating to those subjects which are within the jurisdiction of the Commission.⁵⁰ A suit brought against an initial carrier to recover for loss or damage to an interstate shipment caused by a connecting carrier, under the provision of the Carmack Amendment, is not a suit for the violation of the Act, but is a suit for the value of property which may be brought in the courts of a State.⁵¹ Where an interstate carrier refused to accept shipments of liquor in Indiana consigned to destinations in prohibition counties in Kentucky, it was held that a bill in equity was properly filed in the courts to enjoin the carriers from refusing to accept such shipments without first resorting to the Commission, since the question involved was the validity of the prohibition law, over which the Commission has no jurisdiction, and did not present an administrative question within the scope of its power.⁵²

§ 1014. Testimony compelled in quasi-judicial proceedings.

The powers of the Commission to compel testimony in proceedings under the Act first came before the Supreme Court in *Interstate Commerce Commission v. Brimson*.⁵³ The court recognized in this leading case that Congress had constitutionally prescribed rules to prevent unreasonable charges and unjust discriminations in interstate transportation, and, for the purpose of enforcing those rules, had conferred upon the Commission its power of investigation. Consequently it was said that it was a judicial function for the courts to compel answers to the Commission's inquiries within the scope of its power, be-

⁵⁰ *Louisville & Nashville R. R. v. Scott*, 133 Ky. 724, 118 S. W. 990.

⁵¹ *Galveston, H. & S. A. Ry. v. Piper Co.*, 52 Tex. Civ. App. 568, 115 S. W. 107.

⁵² *Louisville & N. R. R. v. Cook Brewing Co.*, 223 U. S. 70, 32 Sup. Ct. 189.

⁵³ 154 U. S. 447, 38 L. ed. 104, 14 Sup. Ct. 1125.

cause the statute created a duty upon the part of the witness to answer the questions, and as the duty to answer questions specified was capable of judicial enforcement, its enforcement would present a case within the meaning of the Constitution to determine whether what was asked was within the scope of the Commission's power, and whether the questions asked were pertinent to the investigation. The next time the powers of the Commission to summon witnesses came before the Supreme Court was in the case of *Interstate Commerce Commission v. Baird*.⁵⁴ It was held in this case that the Commission had the right to investigate the issues formed, even if complainant had no interest, and that, as the information sought was relevant to the subject-matter of the complaint, it is not a valid objection to the admission of testimony, otherwise relevant and competent, that a third person is interested in it when the proceeding was being prosecuted under the complaint filed, and the testimony was offered with a view to its competency under the allegations made by the complainant. In both of these cases it will be noted the Supreme Court considered exclusively the right of the Commission to have the court's aid in compelling answers in quasi-judicial proceedings to questions which related to violations of the Act to Regulate Commerce; the Court did not have before it, and did not consider in either of these cases any contention that the Commission had any further power to summon witnesses to answer to miscellaneous questions in a general investigation under the Act.

§ 1015. Summoning witnesses in general investigations.

There must not be in this matter any ignoring of constitutional limitations which, for the protection of personal rights, must necessarily be respected in all processes of law. In view of the Bill of Rights in the first ten Amendments to the Constitution it would seem to be be-

⁵⁴ 194 U. S. 25, 48 L. ed. 860, 24 Sup. Ct. 563.

yond the power of Congress, even if any general language of the Act would bear so sweeping an interpretation, to grant unlimited power of making inquiry into affairs of the citizen. The right of personal security under the Constitution involves not merely protection of his person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others. In the leading case of *Harriman v. Interstate Commerce Commission*,⁵⁵ the Supreme Court held not long ago that the witnesses could not be required to answer questions put by the Commission except in connection with complaints for violation of the Act or with the investigation by the Commission of subjects that might have been made the object of complaint, these being the only matters contemplated by those sections of the Act which gave the Commission power to require testimony for the purposes of the Act. Nor could such sweeping powers be exercised by the Commission under the section requiring it to keep itself informed as to the manner and method in which the business of common carriers was conducted, or in connection with the enforcement of the requirement of section 20 concerning reports by carriers themselves. In the *Louisville & Nashville* case decided late in February of this current year the Supreme Court held that the Commission had under the Act no power to demand the access to the correspondence files of the railroads even in a general investigation of its affairs. The primary purpose of the Interstate Commerce Act is to regulate interstate business of carriers, and the secondary purpose, that for which the Commission was established, to enforce the regulations enacted by it; but the power to require testimony seems necessarily to be limited, as is usual in English-speaking countries, to investigations concerning a specific breach of the existing law.⁵⁶

⁵⁵ 211 U. S. 407, 53 L. ed. 252, 29 Sup. Ct. 115.

⁵⁶ See *Interstate Commerce Commission v. Reichman*, 145 Fed. 225.

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Topic D. Proceedings on Its Own Motion

§ 1016. Investigation by the Commission on its own motion.

The Commission, without complaint or petition of an individual may investigate on its own motion the charges or other practices of any carrier subject to its jurisdiction. In such a case, before entering upon the investigation, it will give notice of the time and place of taking testimony, and afford opportunity for calling and cross-examination of witnesses.⁵⁷ Upon investigation if it thereupon appears that the conduct of the carrier is illegal, the Commission should use whatever power it has to correct the injustice shown.⁵⁸ Neither the requirement that complainants must prove the issues raised by competent testimony, nor the requirement that they must make out a *prima facie* case sufficiently clear and strong to require the Commission in the public interest to enter upon an investigation of its own, is satisfied by a comparison, without any other showing, of the rates complained of, with rates between points in other and distant localities where different physical, competitive and traffic conditions exist.⁵⁹ But it should be noted that the Commission has claimed that in the public interest it has discretion at least to investigate matters cognizable in the courts,⁶⁰ even if it can take no action thereon.

§ 1017. Investigation as a result of filing new tariff.

Investigations have from the beginning been ordered by the Commission upon the filing of tariffs. Any general advance in transportation charges it has always held to be a matter of great public concern, and it seemed especially appropriate that the Commission, in the discharge

⁵⁷ *Re Rates and Charges on Food Products*, 3 Int. Com. Rep. 151, 4 I. C. C. 116.

⁵⁸ *In the Matter of Proposed Advances in Freight Rates*, 9 I. C. C. Rep. 382.

⁵⁹ *Dallas Freight Bureau v. M. R. & T. R.*, 12 I. C. C. 427.

⁶⁰ *Joynes v. Pennsylvania R. R.*, 17 I. C. C. 361.

of its duty to keep informed touching the methods and practices of railway carriers subject to the Act to Regulate Commerce should ascertain the reason for advances. After a full investigation the Commission would state its conclusion; but since such general investigation of proposed advances in freight charges was in a manner *ex parte*, although the respondent carriers were fully heard through their traffic representatives, and in some instances through their attorneys, and since facts not brought out in the inquiry, with further discussion of the subject, might lead to a different conclusion, no order would be made. It was, however, threatened that, unless the rates be readjusted in accordance with the views expressed by the Commission, proceedings would be begun against the several lines, which would put directly in issue the rates involved.⁶¹ It should be noted that the Act as amended in 1910 gives the Commission power to inquire into the propriety of an advance, and it is the duty of the Commission to determine the reasonableness of the advances and their propriety as well.⁶²

§ 1018. Investigation by order of Congress.

Investigations instituted as a result of a resolution of either house of Congress have been not infrequent. The Commission has been inclined to hold that its authority in these cases was derived from the permission given in the Act to proceed on its own motion. "Neither the Senate nor the Department of Agriculture is authorized to make any complaint, which under the statute the Commission is required to investigate. The complaint so made and repeated through the Senate and Agricultural Department was not a form of legal process, but an expression of discontent and dissatisfaction with existing rates. It imposed no duty, conferred no power. It was an admonition suggesting too much forbearance if not an omission

⁶¹ In re Advances in Freight Rates,
9 Int. Com. Rep. 382.

⁶² In re Advances on Barley, 24
I. C. C. 664.

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of duty in respect to rates. As such it showed that the Commission did not of its own motion without probable good cause institute this inquiry and begin the investigation under the statute."⁶³ On the other hand, it is to be noted that, in instituting investigations based upon requests emanating from Congress, the Commission in framing its order will as a matter of fortifying its position recite the resolutions upon which it was based, as for example, it did most recently in reopening the inquiry into the financial operations of the New Haven Railroad System.⁶⁴

§ 1019. Procedure upon such investigation.

Such investigation cannot be instituted by petition, since there is no petitioner; but it must be begun by some notice to the carrier investigated of the subject of inquiry. An investigation of this sort having been undertaken, counsel for the carriers attacked the jurisdiction of the Commission on the ground that the proceeding was not commenced and conducted in accordance with the Rules of Practice established by the Commission, and was therefore without authority of law. The Commission, however, held the procedure regular. The Act provides that the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice, and may from time to time make or amend such general rules or orders as may be requisite for the order and regulation of business before it. The Rules of Practice or orders which have been made in accordance with those provisions of the Act refer to proceedings commenced by parties authorized to complain and apply to the Commission by petition. Such rules or orders have no application to proceedings instituted by the Commission on its own mo-

⁶³ Re Rates and Charges on Food Products, 3 Int. Com. Rep. 151, 4 I. C. C. 116.

⁶⁴ Financial Operations of the N. Y., N. H. & H. R. R., 31 I. C. C. 32.

tion. These are commenced and conducted under the statute. The law requires the party complaining of anything done or omitted to be done by any common carrier to apply to the Commission by petition which shall briefly state the facts, and the rules made by the Commission for the regulation of its proceedings require the petition to be verified. If the statute requires the two proceedings, or the method of commencing the two proceedings provided for in section 13 of the Act, to be commenced in the same way, then there would be the absurdity that the Commission to institute inquiry on its own motion must present a petition to itself.⁶⁵ It must be obvious in this, as in other matters, that as the Commission is an administrative body it must stand for the entire public and it must have in mind those who do not appear before it.⁶⁶

§ 1020. Due process of administration.

Unless there is evidence before the Commission to show that the rates attacked were unreasonable, there is no jurisdiction to proceed further. The legal effect of evidence is a question of law; and a finding without evidence is beyond the power of the Commission. The value of evidence varies, and the weight to be given to it is peculiarly for the Commission. Notwithstanding this a finding without evidence of any sufficient character is a nullity. Such authority cannot be granted to any body, even if Congress could be conceived of as so designing. To confide such power to a Commission would be inconsistent with the fundamental principles of justice and an exercise of arbitrary power condemned by the Constitution.⁶⁷ This means that in order to have what may pass as due process of law there cannot be substantial disre-

⁶⁵ *Re Rates and Charges on Food Products*, 3 Int. Com. Rep. 151, 4 I. C. C. 116.

⁶⁶ *In re Advance Rates, Eastern Case*, 20 I. C. C. 243.

⁶⁷ *Atlantic C. L. Ry. v. Interstate*

Commerce Commission, 194 Fed. 449.

See, generally, *Interstate Commerce Commission v. Louisville & N. Ry.*, 227 U. S. 88, 33 Sup. Ct. 185.

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gard of our ancient traditions. The Commission is an administrative body essentially, not bound necessarily to the technique of judicial tribunals. But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve those essentials of action in accordance with evidence adduced by which rights have immemorially been assisted or defended. The Commission is not justified in condemning rates and making revisions upon mere impressions and comparisons, but may act only upon facts and conditions duly established. In this light the right to hearing which the Act provides must be fully protected. Manifestly there is no hearing in any true sense unless the party knows what evidence is offered or considered and is given opportunity to explain and refute it. This is not merely a matter of proper construction of the Act, it is a right which comes from the Constitution itself.⁶⁸

§ 1021. Jealous protection of substantial rights.

These are substantial rights that are thus jealously protected. In making an investigation on complaint of a shipper it has in the public interest the power disembarassed by any supposed admissions contained in the statement of the complaint to consider the whole subject opened up by the complaint. The Commission in other words has combined in its constitution two functions; as an administrative body it may institute proceedings but it passes upon the matters thus brought before it quasi-judicially.⁶⁹ As a practical matter the difficulties of conforming to these requirements are not great. If the Commission takes care to have read into the record the documents it wishes, if it puts forward for examination the investigators it has used, the

⁶⁸ *Chicago, B. & Q. R. R. Co. v. Interstate Commerce Commission*, 206 U. S. 142, 27 Sup. Ct. 648.
Feintuch, 191 Fed. 482.

See particularly, *United States v. Baltimore & O. S. W. R. R.*, 226 U. S. 14, 33 Sup. Ct. 5. See also *Louisville & N. R. R. v. Interstate Commerce Commission*, 195 Fed. 541.

⁶⁹ *Cincinnati, H. & D. R. R. v.*

conveniences are observed. Nobody objects to the Commission using its expertness in dealing with the facts in the record; the objection would be to the Commission giving judgment on evidence locked within themselves. All this is inconsistent with our notions of justice; by discretion we mean a judgment controlled by principles of law. We are not content in modern times with the sort of equity which the Chancellor originally evolved from his inner consciousness to deal with each case as it came before him. Still less will any people with the traditions of our race rest under proceedings of the order of the Star Chamber without being confronted with testimony against them.⁷⁰

§ 1022. Constitutional limitations upon the Federal Government.

Neither Congress, nor any legislative or administrative board acting by its authorization, can competently establish rates for the transportation of property in interstate commerce that will not admit of the carrier earning such compensation for the services rendered as under all the circumstances is just and reasonable to it and to the public; for that would be depriving the carrier of its property without due process of law, and would be taking its property for public use without just compensation in violation of the Fifth Amendment to the Constitution.⁷¹ But any attack by carriers upon an order of the Commission reducing rates, on the ground that the lower rates prescribed are confiscatory will be unsuccessful, where it fails to show the amount of revenue necessary and sufficient for the maintenance of the petitioners as common carriers in the discharge of their duties to the public, and to what extent such revenue would be affected by the rates prescribed in the order complained of. If the

⁷⁰ *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 24 Sup. Ct. 563.

See also *Nashville Grain Ex-*

change v. United States, 191 Fed. 37.

⁷¹ *Missouri, K. & T. R. R. v. Interstate Commerce Commission*, 164 Fed. 645.

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cost of transporting a single commodity cannot be shown and it seems to be conceded that it is rarely possible to so do, then such other facts in lieu thereof as may make out a violation of the Fifth Amendment of the Constitution should be stated.⁷² These are generalizations as they are stated here; but the detail of these rules has already been given in such fundamental chapters as XVII, and the basis of asserting these rights receives full attention in Chapter XXIV.

§ 1023. Recognition of these by the Commission.

If the present system of private ownership of railways is to be continued, sufficient inducement must be extended to private investors.⁷³ The Commission recognizes that there is a limit below which revenue of railways cannot be reduced by public authority.⁷⁴ And whether the result of an order will deprive carriers of fair return on their property must be considered before making any reduction in rates.⁷⁵ The Constitution itself guarantees the carrier against confiscation of their property.⁷⁶ But the unfavorable financial condition of defendant cannot lawfully be remedied by imposing unreasonable rates.⁷⁷ The fact that the rate on a particular commodity could be reduced without impairing seriously the revenues of the carrier, standing alone, has little value and forms no basis upon which to determine reasonableness of rates.⁷⁸ An advance may not be unreasonable, even though for ten years the carrier in question has regularly paid interest on total bonded debt, and recently paid dividends on its stock.⁷⁹ Neither carrier nor Commission should disturb

⁷² *Atlantic C. L. Ry. v. Interstate Commerce Commission*, 194 Fed. 449.

⁷³ *City of Spokane v. N. P. Ry.*, 15 I. C. C. 376.

⁷⁴ *In re Advances in Rates, Eastern Case*, 20 I. C. C. 243.

⁷⁵ *In re Advances in Rates, Western Case*, 20 I. C. C. 307.

⁷⁶ *City of Spokane v. N. P. Ry. Co.*, 21 I. C. C. 400.

⁷⁷ *Railroad Commissioners of Florida v. S. A. L. Ry.*, 16 I. C. C. 1.

⁷⁸ *Minneapolis Threshing Machine Co. v. C., St. P., M. & O. Ry.*, 17 I. C. C. 189.

⁷⁹ *Morgan Grain Co. v. A. C. L. Ry.*, 19 I. C. C. 460.

a long-standing system of rates without considering the effect on property interests; but when a rate is unlawful it should be corrected though it destroys existing property rights.⁸⁰

⁸⁰ *Albree v. B. & M. R. R.*, 22 I. C. C. 303.

CHAPTER XXII

QUASI-JUDICIAL FUNCTIONS OF THE COMMISSION

- § 1030. Provisions of the Act.
- 1031. Orders of the Commission.

Topic A. Power to Order Changes

- § 1032. Power to fix rates originally denied.
- 1033. Decision of the Supreme Court.
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Topic D. Findings of the Commission

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- 1061. How far party may reopen case.
- 1062. Finding of Commission does not work an estoppel.
- 1063. The two-year rule.
- 1064. New petition may be filed.
- 1065. Reopening a case for rehearing.

§ 1030. Provisions of the Act.

The jurisdiction of the Commission to determine rates is to be seen in the advanced stage of its present development in section 15 of the Act which as successively amended now provides that whenever, after full hearing upon a complaint made as provided in section 13, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative (either in extension of any pending complaint or without any complaint whatever), the Commission shall be of opinion that any individual or joint rates or charges whatsoever charged or collected by any common carrier or carriers subject to the provisions of the Act, or that any individual or joint classifications, regulations, conduct or practices whatsoever of such carrier or carriers are unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial or otherwise in violation of any of the provisions of this Act, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged, and what individual or joint classification, regulation, or practice is just, fair, and reasonable, to be thereafter followed. Thereupon an order may be made that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation or transmission in excess of the maximum rate or charge so prescribed, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

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All orders of the Commission, except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the Commission, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction.

§ 1031. Orders of the Commission.

By section 14 it is provided that whenever an investigation shall be made by the Commission, it shall be its duty to make a report in writing in respect thereto, which shall state its conclusions, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made. All reports of investigations made by the Commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of; and the Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for information and use. By section 16 as now amended it is provided that if, after hearing on a complaint made as provided in section 13 of this Act, it shall be determined that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named. Every order of the Commission shall then be served upon the designated agent of the carrier in the city of Washington or in such other manner as may be provided by law. It shall be the duty of every common carrier, its agents and employees, to observe and comply with such orders so long as the same shall remain in effect. The Commission shall be

authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper. And after a decision, order, or requirement has been made by the Commission in any proceeding any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear. Applications for rehearing shall be governed by such general rules as the Commission may establish. No such application shall excuse any carrier from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. Any decision, order, or requirement made after such rehearing, reversing, changing, or modifying the original determination shall be subject to the same provisions as an original order.

Topic A. Power to Order Changes

§ 1032. Power to fix rates originally denied.

It was from the outset a hotly debated question whether the Commission had power under the Act as it originally read to make orders fixing rates to be charged in the future. The right to give such relief, if it found that the rates which were being charged were unreasonable, was vigorously asserted by the Commission at the beginning, as a power essential to its protection of the public from unjust exactions.⁸¹ But the opinion of the courts was practically unanimous against the contention that such a power was conferred upon the Commission by the Act.⁸²

⁸¹ See Interstate Commerce Commission v. Lehigh Valley R. R., 5 Int. Com. Rep. 643; Interstate Commerce Commission v. Northwestern Ry., 5 Int. Com. Rep. 650; Interstate Commerce Commission v. Louisville & N. R. R., 5 Int. Com. Rep.

656 Interstate Commerce Commission v. Alabama Midland Ry., 5 Int. Com. Rep. 685.

⁸² See Interstate Commerce Commission v. Baltimore & O. R. R., 43 Fed. 37; Cincinnati, N. O. & T. P. Ry. v. Interstate Commerce

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It was pointed out as against the argument for the Commission, based largely upon public policy of a vague sort, that Congress by incorporating into a statute the common-law duty resting upon the carrier to make its charges reasonable and just, and directing the Commission to execute and enforce the provisions of the Act, did not by implication invest the Commission with the power to exercise the legislative function of prescribing rates which shall control in the future. Beyond the inference which irresistibly followed from the omission to grant in express terms to the Commission this power of fixing rates was the clear language of section 6, recognizing the right of the carrier to establish rates, to increase or reduce them, and prescribing the conditions upon which such increase or reduction might be made, and requiring, as the only conditions of its action, the publication and the filing of the tariff with the Commission. The grant to the Commission of the power to prescribe the form of the schedules, and to direct the place and manner of publication of joint rates, thus specifying the scope and limit of its functions in this respect, strengthened the conclusion that the power to prescribe rates or fix any tariff for the future was not among the powers granted to the Commission.

§ 1033. Decision of the Supreme Court.

It was not finally decided by the Supreme Court of the United States until the case of *Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific Railway*⁸³ that, although the Commission had power to declare rates unreasonable, it had no power under the Act as it originally provided to fix the rate which the carrier should charge in the future. The masterly argument of Mr. Justice Brewer is still not without its signifi-

Commission, 162 U. S. 184, 40 L. ed. 935, 16 Sup. Ct. 700, 5 Int. Com. Rep. 391; *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. Ry.*, 167 U. S. 479, 42 L. ed. 243, 17 Sup. Ct. 896.
⁸³ 167 U. S. 479, 42 L. ed. 243, 17 Sup. Ct. 896.

cance as to the course to be followed in statutory interpretation, as the beginning of his summing up of his conclusions will show: "We have therefore these considerations presented: First. The power to prescribe a tariff of rates for carriage by a common carrier is a legislative, and not an administrative or judicial, function, and, having respect to the large amount of property invested in railroads, the various companies engaged therein, the thousands of miles of road, and the millions of tons of freight carried, the varying and diverse conditions attaching to such carriage, is a power of supreme delicacy and importance. Second. That Congress has transferred such a power to any administrative body is not to be presumed or implied from any doubtful and uncertain language. The words and phrases efficacious to make such a delegation of power are well understood, and have been frequently used, and, if Congress had intended to grant such a power to the Interstate Commerce Commission, it cannot be doubted that it would have used language open to no misconception, but clear and direct."⁸⁴

§ 1034. Powers established by later Amendments.

Thus from the beginning of federal regulation of interstate carriers to the present time the sound theory upon which that supervision has proceeded has been that the primary right to conduct its business remains with the carrier, the Commission having secondary power to take action when revision is called for. As has just been seen, under the original Act the power of the Commission to give relief from unreasonable charges was held to go no further than to declare the existing rate unreasonable. But by the amendments of 1906 the Commission was given the further power, after finding the rate which was being charged unreasonable, to fix a reasonable rate for the future. It should be noted that, important as that

⁸⁴ See also *Interstate Commerce Commission v. Alabama Midland Ry.*, 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. 145.

amendment was, it did not change the fundamentals of the situation. The carrier still retains the right to make its rates, the Commission having power only to set them aside under the conditions named in the Act.⁸⁵ As to the constitutionality of the Act as amended, there would seem to be no doubt, as it has repeatedly held that such power—even in the more extreme form of establishing rates and making schedules—may be given over to a commission by the legislature. At all events the only question which has been seriously litigated under the Act is the extent to which limitations are imposed upon the Commission. The process provided by the Act in accordance with the principles under discussion is the measure of the authority of the Commission. The Commission cannot take action affecting the charges of a carrier except upon the basis of a hearing and a finding upon the evidence that the rate being charged is unreasonable.⁸⁶

§ 1035. No disturbance of reasonable rates.

The power of the Commission to alter rates depends altogether upon the fact of their unreasonableness, and in the absence of evidence to that effect the Commission has no authority. All this may not have been so plain in regard to this amendment at the outset as it has become subsequently in the light of the decisions interpreting it. But by the time that the case of *Interstate Commerce Commission v. Stickney*⁸⁷ was decided it had become clear enough that a carrier under section 15 as amended was entitled to a finding by the Commission that the particular charge complained of was unreason-

⁸⁵ Likewise the Commission has authority to order a railroad to so adjust its rates as to prevent discrimination against a shipper without prescribing the new rates to be applied, or specifying how the charges should be equalized. See *New York Central & H. R. R. Co. v. Interstate Commerce Commission*, 168 Fed. 131.

⁸⁶ It should be noted that the Commission has no power under the Act to fix minimum rates for the protection of a competitor; its jurisdiction is confined to fixing maximum rates for the carriers involved in the proceedings before it. See *Norfolk & W. R. R.*, 195 Fed. 953.

⁸⁷ 215 U. S. 98, 30 Sup. Ct. 66.

able before a change could be required. Moreover, as that case held, a charge for a service which did not give the carrier more than a fair profit for performing it, was not unreasonable. For the Commission to attempt to fix a new rate at the out of pocket cost in place of the existing rate, which included a profit upon the service performed, was therefore altogether beyond the statutory limitations upon the power of the Commission. Probably, however, this would not be an invasion of constitutional rights, since the profits of the company taken as a whole apparently remained sufficient.⁸⁸ Not until such a finding has been made has the Commission, as the Act reads, any jurisdiction to take any further action.

§ 1036. Basis of reasonable rates.

The duty of the Commission is not that of a lawmaker laying down such rules of public policy as it may think will promote the common weal. Its function is to see whether the rates which the carrier is charging are in accordance with the requirements of law laid down in the Act, and if they are not to make them so. As was insisted in *Interstate Commerce Commission v. Chicago, Rock Island and Pacific Railway*,⁸⁹ this determination is for the Commission in first instance, the power of the courts being confined to discovering whether the action of the Commission is within the scope of the delegated authority under which it purports to have been made. The question in that particular case was a close one, as the Commission had obviously certain policies of rate-making in mind in dealing with basing points which inevitably involve the respective position of trade centers. The carriers complained to the courts that, by the artificial apportionments made, the Commission was laying an arbitrary hand upon the traffic of the country. But the

⁸⁸ See *Minneapolis & St. L. Ry. v. Minnesota*, 186 U. S. 257, 22 Sup. Ct. 901. ⁸⁹ 218 U. S. 88, 30 Sup. Ct. 651.

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Supreme Court decided that there was enough in the record to satisfy it that the rates set aside were unreasonable, and that the rates put in their place were proper. The court was divided, however; and it was obvious that further discussion of the whole matter would soon be required. It is all very well to say, as the majority did, that commissions must have a broad outlook; but the question is by what rules are they to act if we are to have a government of laws, not of men.⁹⁰

§ 1037. Jurisdictional limitations upon rate revision.

It was not until the case of the Southern Pacific Company v. Interstate Commerce Commission,⁹¹ that the significance of these provisos in the Act became apparent, whereby the foundations of the jurisdiction of the Commission were specified. The Commission, as it appeared in that case, had come to the rescue of the lumber industry of the Willamette valley, which was threatened by advances in rates which had been put into effect shortly before. At all events, it had after due proceedings fixed lower rates for the future in place of the old rates, apparently upon the ground that it would be a wise policy to keep open the markets which had thus been closed. The earlier rates undoubtedly had thus created markets upon which the shippers had come to rely; but, as the Supreme Court pointed out, all these arguments ignored the provisions of the Act. In the absence of a finding that the advanced rates which carriers had put in effect were unreasonable, it was clearly laid down that the Commission had no jurisdiction to go further; and this was not made out by showing that public interests would be promoted by lower rates. Such arguments might sometimes

⁹⁰ It should be said that the basing of rates upon what is economically desirable has never been the test of the federal courts in reviewing the orders of the Interstate Commerce

Commission in relation to rates. *Philadelphia & R. Ry. v. Interstate Commerce Commission*, 174 Fed. 687.

⁹¹ 219 U. S. 433, 31 Sup. Ct. 288.

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avail carriers in explaining differentials; but they could not justify commissions in ordering changes.⁹²

§ 1038. Working within legal bounds.

With the famous case of *Interstate Commerce Commission v. Atchison, Topeka & Santa Fe Railway*⁹³ at last brought to a termination by the late affirmation of the Supreme Court we are now in a position to see just what the scope of the power of the Commission is under the Act. This matter of the Lemon rates from the Pacific coast has been going back and forth between the Commission and the courts for some time. First, the Commission reduced the rates for reasons in last analysis more economic than legal; and this order the Commerce Court set aside, as the existing rate had not been sufficiently shown to be unreasonable in the sense of the law. Then the Commission took further testimony, making at least a showing sufficient to justify it in declaring the existing rates unreasonable, and substituted new rates; and the federal court then held in effect that whatever motive might be behind this action there was reason enough apparent in the record for the course it had pursued. All this means that the Commission must work within legal bounds when it sets out to revise rates; and that any carrier which is charging no more than reasonable rates profitable in themselves need not fear disturbance by the Commission upon some theory or other of adjustment of rates.⁹⁴

§ 1039. How the Commission now views its function.

The Commission had never felt altogether free from the

⁹² The general principle which the majority of courts are now laying down as the guide for all concerned seems to be that what is a reasonable rate depends upon the significance of that phrase at common law. *Southern Indiana R. R. v. Railroad Commission*, 172 Ind. 113, 87 N. E. 966.

⁹³ 231 U. S. 736, 34 Sup. Ct. 316.

⁹⁴ The federal courts have always insisted that the Commission shall keep itself to the basis of the conditions affecting the movement of traffic as the standard established by the laws for the reasonableness of rates. *Interstate Commerce Commission v. Delaware, L. & W. Ry.*, 64 Fed. 723.

limitations of the Act. It had said before these decisions of the courts were handed down that its function as an administrative body was to regulate interstate rates only to the extent that jurisdiction had been confided to it by the Congress in accordance with the Constitution.¹ And in another opinion of this period it had said that the duty of the Commission as an administrative body was to establish reasonable rates without attempting to foster one interest at the expense of another.² The Commission has been insistent that it does not sit to give opinions on abstract questions.³ So as a matter of policy it will not construe the Act before any violation thereof is charged; nor will it express an opinion upon facts not brought before it by a petition within its jurisdiction.⁴ And for these reasons it has held that it will not make orders until a violation of Act is charged.⁵ The Commission also appreciates that it does not lie within the scope of its functions to dictate as to the policies upon which carriers shall act in framing a system of rates.⁶ And it will not consider that it has any concern with the intent lying behind an advance in rates, so long as the rates established are reasonable in themselves.⁷

Topic B. Reparation for Past Misconduct

§ 1040. Reasonableness of the established rate.

Rates duly established in accordance with the requirements of the Act to Regulate Commerce are binding upon

¹ *Schemm v. L. & N. R. R.*, 20 I. C. C. 550.

² *Cobb v. N. P. Ry.*, 20 I. C. C. 100.

³ *Pennsylvania Co. v. Louisville, N. A. & C. R. R.*, 2 Int. Com. Rep. 603.

⁴ *Re Order of Railway Conductors*, 1 Int. Com. Rep. 18, 1 I. C. C. 8; *Re Theatrical Rates*, 1 Int. Com. Rep. 18; *Re Inmates of Nat. Homes*, 1 Int. Com. Rep. 73; *Boston & A. R. R. v. Boston & L. R. R.*, 1 Int. Com. Rep. 571; *Re Iowa Barb*

Steel Wire Co., 1 Int. Com. Rep. 605; *Re United States Commission of Fish and Fisheries*, 1 Int. Com. Rep. 606.

⁵ *Re Order of Railway Conductors, Traders & Travelers Union v. Phila. & Reading R. R.*, 1 Int. Com. Rep. 18.

⁶ *Port Arthur B. of J. v. A. & S. Ry.*, 27 I. C. C. 388.

⁷ *Re Advances in Barley*, 24 I. C. C. 664.

carriers and shippers alike so long as they remain in effect. The law requires that such rates shall be reasonable and just and authorizes the Commission to award reparation on account of the exaction of unreasonable transportation charges. It follows that although a rate is by the terms of the law binding upon all so long as it remains in effect, such rate may be found and declared to be unlawful and reparation given on account of its unreasonableness. To hold otherwise would be to make the mere establishment of rates by a carrier conclusive of their reasonableness and justness, and leave shippers without recourse for the recovery of excessive charges. It is the duty of carriers and shippers to observe the established rates, and there can be no waiver of charges which accrue pending a contest or dispute as to the reasonableness of the established rates.⁸ It follows that the Commission has jurisdiction without regard to the amount in controversy, to award damages whenever they arise under the Act, excepting in those cases where the Act itself names another forum.⁹

§ 1041. Reparation in connection with relief.

In any case where the published rate is unjustly discriminatory, the Commission has jurisdiction to order reparation to shippers injured thereby.¹⁰ The power of the Commission is ample to declare rates and rules set forth in a tariff schedule unjust or unreasonable; and when a rate has been found unreasonable, and a reasonable rate has been established, to order that reparation shall be made.¹¹ Whether the Commission is authorized to deny damages where it has found that a rate charged was unreasonable or unjustly discriminatory has not as yet been decided.¹² The constitutionality of the provision author-

⁸ *Moore Produce Co. v. C. M. & St. P. Ry.*, 15 I. C. C. 334. *Co. v. C., R. I. & P. Ry.*, 13 I. C. C. 128.

⁹ *Washer Grain Co. v. M. P. Ry.*, 15 I. C. C. 147. ¹¹ *Moore Produce Co. v. C., M. & St. P. Ry.*, 15 I. C. C. 334.

¹⁰ *Minneapolis Threshing Machine* ¹² *Mfrs. & Merchant's Ass'n v. A. & A. R. R.*, 25 I. C. C. 116.

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izing awards of reparation has been questioned by the carriers on the ground that it deprives the court of jurisdiction over the recovery of damages; but the Commission at all events, has no doubts that the granting of reparation is an integral part of the system of regulation whereby the rates scheduled must be paid until revised by the Commission.¹³

§ 1042. Concurrent jurisdiction over relief.

The bringing of a suit in the United States Circuit Court for the recovery of excessive railway charges is not a bar to a subsequent proceeding before this Commission, where that suit was dismissed without prejudice, and for the reason that the Commission had never passed upon the reasonableness of the rate involved.¹⁴ Notwithstanding the powers conferred on the Commission by section 15 of the Act, the federal courts have jurisdiction under section 9 over the subject-matters in a suit for damages for unjust discrimination; and it was not necessary first to resort to the Commission.¹⁵ The jurisdiction of Commission to award damages has been said to be dependent upon the establishing of a maximum rate, as its power to grant reparation is dependent upon its finding reason to alter the schedule complained of on the basis that it is unreasonable as it stands.¹⁶ The Commission is, therefore, as has been held in another opinion recently, without authority to award damages in any case unless the rate assailed was in violation of the Act at the time shipments moved.¹⁷

§ 1043. Attitude of the courts.

Relief from excessive freight charges upon interstate shipments, where the charges are made according to established rates fixed and promulgated as required by the

¹³ *Commercial Club of Omaha v. A. & S. R. Ry.*, 27 I. C. C. 302.

¹⁴ *Langdon v. Penn. R. R.*, 194 Fed. 486.

¹⁵ *Baer Bros. Mercantile Co. v. Missouri P. R. Co.*, 11 I. C. C. 329.

¹⁶ *Commercial Club of Omaha v. A. & S. R. Ry.*, 27 I. C. C. 302.

¹⁷ *New Pittsburg Coal Co. v. H. V. Ry.*, 26 I. C. C. 121.

Act, must, therefore, be sought through the Commission.¹⁸ Generally speaking the enforcement of the Interstate Commerce Act is naturally enough regarded as a federal matter; the United States courts and the Interstate Commerce Commission have exclusive jurisdiction of actions based upon the Act, or brought to enforce a right created by the Act.¹⁹ The Commission alone has original jurisdiction to determine whether an existing rate schedule, or an existing regulation or practice affecting rates or an existing regulation or practice of any other kind affecting matters sought to be regulated by the Act, is unjust or unreasonable, or unjustly discriminatory, or unduly preferential, or prejudicial.²⁰ And the courts cannot by mandamus, injunction or otherwise control or modify any order of the Commission made by it in the due performance of its merely administrative functions.²¹

§ 1044. Wrongs outside Commission jurisdiction.

The authority of the Commission to award damages extends only to such damages as accrue from violations of the Act.²² And the Act restricts the Commission's authority to award damages to cases in which the carrier may only be liable under the Act.²³ As the Commission can award damages only for violation of the Act, it has no authority to administer a remedy in applications for relief based solely upon a contractual relation.²⁴ No duties are delegated to the Commission to determine the purpose or scope of statutes under which rights and privileges may be reserved to the United States in return for subsidies in lands or loans or credit.²⁵ And likewise wrongs defined

¹⁸ *A., T. & S. F. Ry. v. The Superior Refining Co.*, 83 Kan. 732, 112 Pac. 604.

¹⁹ *Hardaway v. Southern Ry.*, 90 S. C. 475, 73 S. E. 1020.

²⁰ *Saunders & Co. v. S. P. Co.*, 18 I. C. C. 415.

²¹ *Morrisdale Coal Co. v. Penn. R. R.*, 183 Fed. 929.

²² *Hampton Mfg. Co. v. O. D. S. Co.*, 27 I. C. C. 666.

²³ *Blume & Co. v. Wells, Fargo & Co.*, 15 I. C. C. 53.

²⁴ *Wood-Mosaic Flooring & Lumber Co. v. L. & N. R. R.*, 22 I. C. C. R. 458.

²⁵ *United States v. U. P. R. R.*, 28 I. C. C. 518.

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by the anti-trust acts, such as unfair competition, have been held to be beyond the Commission's jurisdiction.²⁶ On the other hand, if there be a combination in restraint of trade among shippers which controls price of commodity without regard to ordinary laws of production and distribution, that is no excuse for unreasonable rate.²⁷ But if a combination among carriers to raise rates unduly is discovered the advanced rates may be suspended under the powers which the Commission now possesses.²⁸ But the mere fact in itself that advances were the results of concerted action does not furnish a foundation for declaring rates unlawful.²⁹ It should be noted, however, in qualification of the authority of these decisions to-day that by the sweeping clauses of the Clayton Act a load supervision over restraint of trade and monopolization of commerce by carriers subject to the Act has been conferred upon the Commission.³⁰

§ 1045. Limitations upon its powers.

The Commission is the creature of statute; and its authority is solely derived from the Act of Congress creating the Commission and the various amendments; its function is to administer the Act to Regulate Commerce and not to enforce conditions found in Federal or other charters. While, therefore, a violation of the conditions of the acts of Congress granting the rights of way may be grounds for forfeiture, the remedy is in the courts, as it is not the province of the Commission to enforce compliance with conditions subsequent found in railroad charters.³¹ The Commission has had to point out again and again that the jurisdiction which it possesses to award compensation in suit for reparation for past offenses against

²⁶ *Iowa v. A. C. L. R. R.*, 24 I. C. C. 134.

²⁷ *Maritime Exchange v. P. R. R.*, 21 I. C. C. 81.

²⁸ *In re Advances in Rates, Eastern Case*, 20 I. C. C. 243.

²⁹ *Railroad Commission of Tex. v. A., T. & S. F. Ry.*, 20 I. C. C. 463.

³⁰ These clauses are reprinted in the Appendix.

³¹ *Haines v. Chicago, R. I. & P. R.*, 11 I. C. C. 214.

the Act does not cover suits for damages generally for injuries done to shippers by carriers. So the Commission will dismiss a suit which comes down upon analysis to an action of conversion for withholding delivery of goods.³² And, generally speaking, there is no jurisdiction to award damages in tort for negligent injuries or consequential damages resulting therefrom.³³ Where a complainant asked the establishment of routing for certain interstate electric passenger cars over a viaduct owned by a bridge company which is not subject to the Act, it was dismissed for want of jurisdiction, the relief sought being a plan of physical operation not within the Commission's power.³⁴ And on the same grounds a petition asking that carriers be required to transport goods without delay was dismissed.³⁵ Likewise the Commission has no power to compel lake lines to run their boats to a given city, as it pointed out in a recent decision.³⁶

§ 1046. Basis of Commission jurisdiction.

As has already been pointed out several times in the course of this discussion, the Commission has no jurisdiction to enforce contracts in any proceeding.³⁷ And consequently it is not within the province of the Commission to determine the validity or legality of a contract.³⁸ Thus it was said in one proceeding that if the complainants had a contract with defendant to locate and maintain its station, they may perhaps maintain a suit at law for breach of that contract; but the Commission has no power to award damages for failure to perform such a contract.³⁹ And in another proceeding it was said later that the power of the Commission to require switch connection

³² *MacBride C. & C. Co. v. St. P., M. & O. Ry.*, 13 I. C. C. 571.

³³ *Folmer & Co. v. Gt. No. Ry.*, 15 I. C. C. 33.

³⁴ *Kansas City v. K. C. V. & T. Ry.*, 24 I. C. C. 22.

³⁵ *Pocchatouls Farmers' Ass'n v. I. C. R. R.*, 19 I. C. C. R. 513.

³⁶ *Escanaba Business Men's Ass'n v. A. A. R. R.*, 24 I. C. C. 11.

³⁷ *L. & N. R. R. Co. v. M., St. P. & S. S. M. Ry.*, 24 I. C. C. 639.

³⁸ *Greenbaum Co. v. C. & O. Ry. Co.*, 25 I. C. C. 352.

³⁹ *Eddlemann v. Midland Valley R. Co.*, 11 I. C. C. 103.

was not founded upon any contractual relationship existing between carriers and those entitled to invoke the benefit of the statute; and therefore the Commission is without jurisdiction to compel defendant to specifically perform a contract in respect thereto or to award damages for the breach thereof.⁴⁰ The Commission's jurisdiction, in a general sense, extends only to the duties which the carrier owes to its patrons as a common carrier to the shipping public.⁴¹ It does not purport to have been given jurisdiction generally to adjudicate claims between carriers and shippers, even those arising out of matters happening in connection with the transportation itself.⁴²

§ 1047. Extent of its powers.

The Commission, therefore, is not made a court to settle differences to which carriers are parties; indeed under our constitutional system judicial power of this extensive character could not be intrusted to an administrative body. Thus the Commission does not undertake to determine questions of respective liability, such as whether the vendor or the vendee is liable for demurrage charges.⁴³ And the Commission is even without authority to enter an order requiring a shipper to make good to the carrier an undercharge, where less than the published rate has been collected by error.⁴⁴ And the Commission cannot allow set-off of unpaid freight bills against a reparation suit for improper exaction of unreasonable rates as that would involve jurisdiction over collecting bills.⁴⁵ It is equally clear, as has been seen, that the Commission has no power as between carrier and shipper to direct payment of damage claims, since a failure to answer for

⁴⁰ *Ralston Townsite Co. v. M. P. Ry. Co.*, 22 I. C. C. 354.

⁴¹ *Southwestern Produce Distributors v. W. R. R. Co.*, 20 I. C. C. 458.

⁴² *Lanning H. C. & G. Co. v. St. L. & S. F. R. R.*, 15 I. C. C. 37.

⁴³ *Crescent Coal & Mining Co. v. B. & O. R. R. Co.*, 23 I. C. C. 81.

⁴⁴ *Falls & Co. v. C., R. I. & P. Ry. Co.*, 15 I. C. C. 269.

⁴⁵ *Lanning Harris Coal & G. Co. v. St. Louis & St. F. R. R.*, 15 I. C. C. 37.

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⁴⁵ *Lanning Harris Coal & G. Co. v. St. Louis & St. F. R. R.*, 15 I. C. C. 37.

torts is not a violation of the Act.⁴⁶ Nor has the Commission jurisdiction over prompt settlement of damage claims, since this would involve the judicial power of delivering private rights.⁴⁷ Injuries caused by negligence are not a ground for granting reparation by the Commission as this would involve the redress for private wrongs.⁴⁸ And it is not the tribunal to resort to for an award of damages for shrinking of cattle in transit.⁴⁹ Likewise, the Commission has no jurisdiction over suits to recover damages to shippers caused by delays in handling shipments.⁵⁰ It is equally true that the Commission has no jurisdiction over contracts between carriers and shippers so long as these do not affect rates for service subject to the Act.⁵¹ Certainly there has been no attempt to make it a court of equity to enforce performance of contracts.⁵² Nor can it assume jurisdiction to determine liabilities for breach of contract.⁵³ Generally speaking, only those matters which affect rating in transportation are within its jurisdiction.⁵⁴

Topic C. Jurisdiction of the Commission

§ 1048. Recovery based upon published rate.

A carrier is prohibited from accepting either more or less or different compensation than that stated in tariff.⁵⁵ The Act charges every shipper with knowledge of the lawful rate, or rather makes it immaterial whether or not he knows it.⁵⁶ Shippers, being charged by law with knowl-

⁴⁶ *Larkin Co. v. E. & W. T. Co.*, 24 I. C. C. 645.

⁴⁷ *Ponchatoula Farmers' Ass'n v. I. C. R. R.*, 19 I. C. C. 513.

⁴⁸ *Folmer Co. v. Gt. No. R. R.*, 15 I. C. C. 33.

⁴⁹ *Carstein's Packing Co. v. Oregon R. R. & N. Co.*, 17 I. C. C. 125.

⁵⁰ *Pittsburgh, C., C. & St. L. Ry. v. Knox*, 177 Ind. 344, 98 N. E. 295.

⁵¹ *Consolidated Pump Co. v. L. S. & M. S. Ry.*, 27 I. C. C. 519.

⁵² *Ralston Townsite Co. v. M. P. Ry.*, 22 I. C. C. 354.

⁵³ *General Electric Co. v. N. Y. C. & H. R. R. R.*, 14 I. C. C. 237.

⁵⁴ *In re Weighing of Freight by Carriers*, 28 I. C. C. 7.

⁵⁵ *Ford Co. v. M. C. R. R. Co.*, 19 I. C. C. 507.

⁵⁶ *Franke Grain Co. v. I. C. R. R.*, 27 I. C. C. 625.

edge of the lawful rates, cannot claim the benefit of a lower than the lawful rate, on the ground that some railroad clerk has made a mistake in quoting a lower rate for a particular shipment.⁵⁷ Rates are governed by published tariffs and not by notations made on bills of lading, or other extrinsic representations.⁵⁸ The terms of the tariffs filed and published are the sole guide in assessing transportation charges for better or worse.⁵⁹ The general principle underlying these rules is that a carrier is bound to charge neither more nor less nor different compensation to any shipper than the scheduled rate.⁶⁰ The lawfully published rate is, therefore, the only rate that can be applied, regardless of rate quoted.⁶¹ And mistake of a shipper as to what rate is applicable to his shipment is no basis for reparation.⁶² In cases of the exaction of a rate higher than that in the published tariff, the shipper may go into court in the first instance; but the Act also appears to give the Commission and courts concurrent jurisdiction in this respect.⁶³ Indeed, if higher rates than schedule have been collected, it is a case where the carrier should voluntarily make a refund to the shipper, subject to the scrutiny of the transaction by the Commission.⁶⁴ It is to be noted, however, that straight overcharges can and should be refunded without going to the Commission.⁶⁵ And generally speaking unpublished charges and those in excess of published charges should be so refunded.⁶⁶ If there is no scheme to cover a rebate on foot, it will be safe for the carrier to refund such overcharge on own ac-

⁵⁷ *Poor Grain Co. v. Chicago, B. & Q. R.*, 12 I. C. C. 418.

⁵⁸ *Pole Stock Lumber Co. v. G. & S. I. R. R.*, 26 I. C. C. 451.

⁵⁹ *Johnson v. A., T. & S. F. Ry.*, 25 I. C. C. 207.

⁶⁰ *Humbolt S. S. Co. v. W. P. & Y. Route*, 25 I. C. C. 136.

⁶¹ *Oster Bros. v. M. L. & T. R. R. & S. S. Co.*, 21 I. C. C. 511.

⁶² *Running v. St. P., M. & O. Ry.*, 19 I. C. C. 565.

⁶³ *Laning-Harris Coal & Grain Co. v. St. L., & S. S. F. R. R.*, 15 I. C. C. 37.

⁶⁴ *Forster Bros. Co. v. D. S. S. & A. Ry.*, 14 I. C. C. 232.

⁶⁵ *Isabell Brown Co. v. M. C. R. R.*, 15 I. C. C. 616.

⁶⁶ *Northern Lumber Mfg. Co. v. T. & P. Ry.*, 19 I. C. C. 54.

count.⁶⁷ If it turns out that there was no tariff authority for the alternative rates upon the basis of which a refund had previously been made, the refund originally made to the shipper should thereupon be returned to the carrier.⁶⁸

§ 1049. Effect of misquoted rate.

The Commission has always maintained that the misquotation of a rate is no basis for an award of reparation against a carrier.⁶⁹ It has been felt that it could not properly permit the complainant to obtain by means of refund an advantage to which it is not entitled under regulations formerly in effect.⁷⁰ The question as to what rates should be applied is not to be determined by reference to information given out by clerks.⁷¹ It follows that where one ships from a certain point on the assurance of the carrier that a certain rate applied, a higher rate being in fact in force, it is immaterial, on the question of reparation, whether the shipper would have made the shipment.⁷² Had he not been misinformed, it is possible he might have protected himself.⁷³ Yet the rule is positive that the schedule governs even in case of misquotation by a rate clerk.⁷⁴ It is fundamental that the lawfully established rate is the rate that must be applied, notwithstanding the erroneous information given.⁷⁵ The policy of this is to make it clear that even when there has been a misquotation of a tariff rate, there is no ground for departure from the rates which others are paying.⁷⁶ In other words, the published rate must be paid and collected, regardless of what rate is quoted.

⁶⁷ *Mounsens & Co. v. Gila V. G. & N. Ry.*, 14 I. C. C. 614.

⁶⁸ *Birge-Forbes Co. v. M. R. & T. Ry.*, 28 I. C. C. 409.

⁶⁹ *Fairbault Furniture Co. v. Chicago Gt. W. R. R.*, 25 I. C. C. 40.

⁷⁰ *Clinton Sugar Refining Co. v. C. & N. W. Ry.*, 28 I. C. C. 364.

⁷¹ *Crescent Coal & Mining Co. v. C. & E. I. R. R.*, 24 I. C. C. 149.

⁷² *Williamette Pulp & Paper Co. v. N. P. Ry.*, 18 I. C. C. 388.

⁷³ *Snyder M. D. v. Chicago, B. & O.*, 18 I. C. C. 493.

⁷⁴ *McLean Lumber Co. v. L. & N. R. R.*, 22 I. C. C. 349.

⁷⁵ *Alabama Lumber & Export Co. v. P. B. & W. R. R.*, 19 I. C. C. 295.

⁷⁶ *Scott v. T. & N. O. R. R.*, 20 I. C. C. 167.

§ 1050. Recovery of scheduled rate through legal proceedings.

The strict provisions against rebating in the Act are based upon an ingenious plan. It has been seen that the system of regulation now prevailing is predicated upon having a schedule of rates prepared by the railroad and filed with the Commission, and duly published and posted as required. When this has been done, the rate so scheduled and filed cannot be changed by the railroad without the filing and sufficient publication of a new rate. It is to safeguard this situation that the doctrine is carried to such an extent that even if a shipper is at first charged a lower rate quoted him by a freight agent, he can later be compelled to pay the difference between this and the scheduled rate; and the courts have gone along with this doctrine to the extent that the logic of the situation requires.⁷⁷ If the rate so published is unreasonable in itself or otherwise disproportionate, nevertheless the shipper cannot now go to the courts to get redress. The shipper's only remedy is by a complaint to the Commission, which will result, if successful, in a reduction in the future and in damages for past unfair exactions. By the system established under the Act, the Commission has power to inquire into the reasonableness of the scheduled rate, and to make it

⁷⁷ *United States*—*Texas & P. Ry. v. Mugg*, 202 U. S. 242, 26 Sup. Ct. 242; *Gulf C. & S. F. Ry. v. Hefley*, 158 U. S. 98, 15 Sup. Ct. 802; *Henderson Elevator Case*, 226 U. S. 441, 33 Sup. Ct. 176; *Gt. Northern Ry. v. Kalispell L. Co.*, 165 Fed. 25; *Columbus I. & S. Co. v. Kanawha & M. Ry.*, 171 Fed. 713.

Alabama—*Southern Ry. Co. v. Harrison*, 119 Ala. 539, 24 So. 55.

Arkansas—*St Louis & S. F. R. R. v. Ostrander*, 66 Ark. 567, 52 S. W. 435.

Connecticut—*Rowland v. New York, N. H. & H. R. R. Co.*, 61 Conn.

103, 23 Atl. 755, 29 Am. St. Rep. 175.

Georgia—*Savannah F. & W. Ry. Co. v. Bundick*, 94 Ga. 775, 21 S. E. 995.

Louisiana—*Foster G. Co. v. Kansas City So. Ry.*, 121 La. 1053, 40 So. 1014.

Montana—*Bullard v. Northern Pacific Ry. Co.*, 10 Mont. 168, 25 Pac. 120.

Nebraska—*Haurigan v. Chicago & N. W. Ry. Co.*, 80 Neb. 132, 117 N. W. 100.

Texas—See *Southern Pac. Ry. Co. v. Redding* (Tex. Civ. App.), 43 S. W. 1061.

lower for the future if it finds it unreasonable. And the power given to the Commission by the other process of the Act to award damages in reparation for past exactions is complementary. It is essential to the comprehensiveness of this system that the jurisdiction of the Commission on both lines should be exclusive, and that in the courts the reasonableness of the rate duly scheduled should be held to be conclusive.⁷⁸

§ 1051. State courts deprived of jurisdiction.

If, therefore, a shipper is ready to prove that the rate charged him was outrageously high he can no longer, as formerly, litigate the matter in the courts, and show that the established rate is unreasonable. He must go to the Commission to get the scheduled rate set aside, and reparation awarded him for the extortion. It follows from all this that in an action in a State court by a carrier to recover demurrage, based on a schedule of demurrage charges duly published and filed with the Commission the court has no jurisdiction to determine the reasonableness of the charges, as original jurisdiction with respect thereto is vested in the Commission.⁷⁹ Under the provi-

⁷⁸ *United States*—*Texas & P. Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. 350; *Southern Ry. v. Tift*, 206 U. S. 428, 27 Sup. Ct. 709; *Robinson v. Baltimore & O. R. R.*, 222 U. S. 506, 32 Sup. Ct. 113; *Am. V. Coal Co. v. Pennsylvania R. R.*, 159 Fed. 278; *Van Patten v. Chicago, M. & St. P. Ry.*, 81 Fed. 545.

Georgia—*Georgia R. R. v. Creety*, 5 Ga. App. 424, 63 S. E. 528.

Missouri—*Miles v. St. Louis & S. F. Ry.*, 134 Mo. App. 379, 114 S. W. 1052.

Nebraska—*Wentz-Bates Mercantile Co. v. Union Pacific Ry.*, 85 Neb. 584, 123 N. W. 1085.

New Hampshire—*Clough v. Boston*

& M. R. R., 77 N. H. 77, 90 Atl. 863.

New Jersey—*Erie R. R. v. Wanaque L. Co.*, 75 N. J. L. 878, 69 Atl. 168.

Oklahoma—*Atchison, T. & S. F. Ry. v. Holmes*, 18 Okla. 92, 90 Pac. 22.

South Dakota—*Great No. Ry. v. Loonan L. Co.*, 25 S. D. 155, 125 N. W. 645.

Washington—*Lilly v. Mo. Pac. Ry.*, 64 Wash. 589, 117 Pac. 401.

West Virginia—*Robinson v. Baltimore & R.*, 64 W. Va. 406, 63 S. E. 323.

⁷⁹ *Erie R. R. Co. v. Wanaque Lumber Co.*, 75 N. J. L. 878, 69 Atl. 168.

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sions of the Act no court has any power, in the first instance, to inquire into the reasonableness of any rate that has been regularly established by a railway company and filed with the Commission; for the question of whether or not a rate is reasonable and just is one to be determined, in the first instance, in a proper proceeding before the Commission.⁸⁰ And consequently the courts have no jurisdiction to enjoin the enforcement of rates after the schedule has been filed and put into effect, since the authority to determine the reasonableness of rates is vested by the Act exclusively in the Commission.⁸¹ And the general principle will be insisted upon, whatever may be the way in which the point comes up, that the Commission has exclusive jurisdiction of all questions concerning the reasonableness of increased rates.⁸²

§ 1052. Scheduled rates conclusive in the courts.

This doctrine in all its scope can only be appreciated by a study of some of the cases recently decided, such as those which have been selected for statement in this connection. Since the Commission now has power to suspend the taking effect of rates filed with it, it would seem that even the federal courts have no power to enjoin the filing of a schedule of rates under a bill brought prior to the date of filing of the tariffs, as the Commission has exclusive jurisdiction of determining all questions of reasonableness with respect to rates.⁸³ Where the published interstate rate is collected and an action is brought in a State court to recover for the excess exacted above a sum alleged to be a reasonable charge, the only evidence that will justify the action is a prior judgment of the Commission holding the rate complained of to be unreasonable.^{83a} In an action

⁸⁰ *Great Northern Ry. v. Loonan Lumber Co.*, 25 S. D. 155, 125 N. W. 645.

⁸¹ *Great Northern Ry. v. Kalispell Lumber Co.*, 165 Fed. 25.

⁸² *Wickwire Steel Co. v. N. Y. C. & H. R. R. R.*, 181 Fed. 316.

⁸³ *Columbus I. & S. Co. v. Kanawha & M. Ry.*, 171 Fed. 713.

^{83a} *Robinson v. B. & O. R. R. Co.*, 64 W. Va. 406, 62 S. E. 323.

for unjust discrimination the complaint does not state a cause of action where it neither alleges that the carrier has not complied with the requirements of the Interstate Commerce Act with reference to filing of rates nor alleges that by the rates charged it exceeded the rate shown in the schedule.⁸⁴ In a suit by a carrier to recover the published interstate rate the defendant cannot set up as a valid plea the unreasonableness of such rate, since original jurisdiction over the question of reasonableness in establishing interstate rates is vested with the Commission.^{84a}

§ 1053. No reparation for misquoted rate.

The requirements of the Act with respect to the filing of all charges which the Commission may require, remove from the carrier and from the shipper the right which existed under the common law to contract on any basis other than that specifically set forth in the carrier's published tariffs.⁸⁵ In publishing a rate or a schedule of rate the carrier must act under section 1 of the Act, requiring rates to be reasonable and just. If it establishes a rate which is excessive, such rate is not regarded in the forum of the Commission as lawful when its reasonableness is subsequently questioned upon complaint filed.⁸⁶ While it is the legal rate, the rate that must be paid by the shipper and collected by the carrier because it is the published rate, the mere publication by the carrier cannot make a rate lawful that is unreasonable before the body which has power to pass upon it.⁸⁷ No rate can be lawful in the sense of being immune from attack with respect to past and future shipments if it be excessive or unreasonable in amount.⁸⁸ As will be seen, it is held that the failure to

⁸⁴ *Lilly v. Northern Pacific Ry.*, 64 Wash. 589, 117 Pac. 401.

^{84a} *Baltimore & O. R. R. v. La Due*, 128 App. Div. 594, 112 N. Y. Supp. 964.

⁸⁵ *Peale, Peacock & Kerr v. Central R. R. Co. of New Jersey*, 18 I. C. C. 25.

⁸⁶ *Arkansas Fuel Co. v. C., M. & St. P. Ry.*, 16 I. C. C. 95.

⁸⁷ *Reno Wholesale Liquor Store v. Southern Pacific Co.*, 23 I. C. C. 516.

⁸⁸ *Newding v. M. K. & T. Ry.*, 19 I. C. C. 29.

post a tariff which contains no change in rates, and a misleading quotation by the agent of the carrier, afford no basis for reparation.⁸⁹ It should be noted, however, that the Act provides a penalty against a railroad which deliberately misquotes a rate which the shipper formally asks in writing.⁹⁰

§ 1054. Liability for negligence in quoting rates.

Although in general the application of these principles is well settled, there are still some difficult situations to deal with. In one recent case a carrier quoted a rate to a shipper which by error was less than that published; and the shipper in reliance thereon later made a contract for sales on that basis. Later the carrier notified the shipper that a mistake had been made and quoted a new rate, which by a second mistake was higher than the published rate. The shipper called off his negotiations and refused to ship, although as he testified he would have shipped at the correct rate; and in his suit subsequently for lost profits it was held by the State court recently that he might recover.⁹¹ It is, as has been seen, clear that if negligence results in the quotation of a rate lower than that published, it is impossible to save to the shipper his usual remedy, since it would enable him to get service at a discriminatory rate, thus militating against the integrity of the Act.⁹² But in a case like this if no liability was incurred a higher rate might be continually quoted to shippers in disfavor, thereby putting them at a disadvantage. A question might arise as to the jurisdiction of the State court, particularly if it be held that the remedy of a prospective shipper did not exist at common law, but arises by virtue of the Act.⁹³ And it has been

⁸⁹ *Faribault Furniture Co. v. C. G. W. R. R.*, 25 I. C. C. 40.

⁹⁰ *O'Brien & Co. v. N. P.*, Unrep. No. 227.

⁹¹ *Aldrich v. So. Ry. (So. Car.)*, 79 S. E. 316.

⁹² *Poor Grain & P. Co. v. C., B. & Q. Ry.*, 12 I. C. C. 418.

⁹³ *Galveston H. & T. C. Ry. v. Wallace*, 223 U. S. 481, 32 Sup. Ct. 205.

held recently ⁹⁴ that a shipper may sue for the carrier's failure to post and keep open for inspection its established rates, whereby the shipper is compelled to pay a higher rate than that in effect over a competing line, and in such a suit recover the difference between the rate paid and competitive rate. But this is in the face of the fact that the shipper would thereby be charged less than the charge published for all, which it is the policy of the ruling cases to make impossible in general at whatever cost to individuals. It is submitted, therefore, that it will be the safe course to make no such concessions as these two cases discussed in this paragraph were tempted to permit but to hold to the doctrine of the inevitable incidence of the scheduled rate, subject to the special penalty of the statute for failing to quote correctly a rate formally asked in writing.

§ 1055. Limitations of this policy.

The principal line of distinction is, therefore, clear enough. If the basis of the suit is in any way an attack upon the propriety of anything in the schedule the jurisdiction of the Commission is exclusive. Thus, as has been seen, that such rates so scheduled are reasonable cannot be questioned in any proceeding before the courts, as jurisdiction to reduce or realign them for the future, and to give damages and reparation for past exactions, has been exclusively vested in the Commission. But the courts are not otherwise ousted from the jurisdiction they formerly possessed for overcharge and undercharge as to suits between shippers and carriers. Thus if a shipper has been compelled to pay more than the scheduled rate he may sue in the courts for recovery of the overcharge.⁹⁵ And likewise the carrier, if by mistake the shipper has paid less than the schedule calls for, not only may but should resort to the courts to recover the balance.⁹⁶ It is, there-

⁹⁴ *St. Louis S. W. Ry. v. Lewallan Bros.*, 192 Fed. 540.

⁹⁵ *Hardaway v. Southern Ry.*, (S. C.), 73 S. E. 1020.

⁹⁶ *Oregon Ry. & N. Co. v. Coolridge*, 58 Oreg. 95, 116 Pac. 93; but see *Baldwin Land Co. v. Columbia R. Ry.*, 58 Oreg. 285, 114 Pac. 469.

fore, well established that, while in transportation under the Act the reasonableness of rates is to be determined only by the Commission, one who has been made to pay more than the published rates may bring suit in State courts for its recovery, on the basis of the immemorial action at common law against a carrier for the recovery of the excess when more than a proper charge has been exacted.⁹⁷ Whatever courts would as between shipper and carrier normally entertain such suits may proceed to the extent indicated in this paragraph; and it should be noted that apparently the two-year limitation in the Act for reparation suits would not apply in the forum of the courts of the State.⁹⁸

Topic D. Finding of the Commission

§ 1056. Power to grant reparation.

The Act now confers authority upon the Commission to award damages in cases brought before it.⁹⁹ Under this provision, reparation will be ordered equal to the amount of any overcharge which the Commission finds to have been made.¹ Under the Act as first passed the Commission had held that it had no power to consider a claim for damages.² While the Commission found as a fact that the charges of defendant were in some instances unreasonable, it at first made no attempt to formulate

⁹⁷ *Brantly Co. v. Ocean S. S. Co.*, 5 Ga. App. 844, 63 S. E. 1129.

⁹⁸ *Chicago, R. I. & P. Ry. v. Lena Lumber Co.*, 99 Ark. 105, 137 S. W. 562; see also *Kansas City So. Ry. v. Tonn*, 102 Ark. 20, 143 S. W. 577.

⁹⁹ *Cattle Raisers' Ass'n v. Chicago, B. & Q. R. R.*, 10 I. C. C. Rep. 83.

¹ *Macloon v. Chicago & N. W. Ry.*, 3 Int. Com. Rep. 711, 5 I. C. C. 4; *Rea v. Mobile & O. Ry.*, 7 I. C. C. Rep. 55; *Grain Shippers' Ass'n v. Illinois C. R. R.*, 8 I. C. C. Rep. 158; *Chicago F. P. C. Co. v. Chicago & N. W. Ry.*, 8 I. C. C. Rep. 316;

Roth v. Texas & P. Ry., 9 I. C. C. Rep. 602; *Gardner v. Southern R. R.*, 10 I. C. C. Rep. 342; *Pitts v. Atchison, T. & S. F. R. R.*, 10 I. C. C. Rep. 691; *Pitts v. St. Louis & S. F. R. R.*, 10 I. C. C. Rep. 684; *Hope Cotton Oil Co. v. Texas & P. Ry.*, 10 I. C. C. Rep. 696.

² *Heck v. East Tennessee, V. & G. R. R.*, 1 Int. Com. Rep. 775, 1 I. C. C. 495; *Council v. Western & A. R. R.*, 1 Int. Com. Rep. 638, 1 I. C. C. 339; *Riddle v. New York, L. E. & W. R. R.*, 1 Int. Com. Rep. 787, 1 I. C. C. 594.

orders.³ Reparation will now also be awarded for damages caused by other violations of the Act besides overcharge: for instance, for failure to furnish cars.⁴ The effect of an advance in through rates cannot be determined in a proceeding in the same suit for reparation, as regards territory to which the reduction in the through rate did not apply, but is a matter for independent inquiry in a new proceeding.⁵

§ 1057. Bases of award by reparation.

The Commission has jurisdiction without regard to the amount in controversy, to award damages whenever they arise under the Act, excepting in those cases where the Act itself names another forum.⁶ Overcharge beyond the scheduled rate may be refunded by the carrier without going to Commission; but reparation for scheduling too high a rate can only be worked out by going to the Commission.⁷ And it is to be noted that reparation is awarded only on the basis of finding that the rate is excessive.⁸ The Commission cannot award reparation merely on the admission of defendant that complainant is party entitled to it; it must be affirmatively shown that complainant is proper party to obtain reparation.⁹ The Commission it seems is not authorized by the law to deny reparation in a case where it has found that the rates charged complainant were unreasonable or unjustly discriminatory.¹⁰ Because a rate is found unreasonable it cannot be assumed the Commission will, as a matter of course, award reparation upon the basis of the rate found to be reason-

³ *Barrow v. Yazoo & M. V. R. R.*, 10 I. C. C. Rep. 333.

⁴ *Glade Coal Co. v. Baltimore & O. R. R.*, 10 I. C. C. Rep. 226; *Paxton Tie Co. v. Detroit S. R. R.*, 10 I. C. C. Rep. 422.

⁵ *Cattle Raisers' Ass'n v. Chicago, B. & Q. R. R.*, 10 I. C. C. Rep. 83.

⁶ *Washer Grain Co. v. M. P. Ry.*, 15 I. C. C. 147.

⁷ *Tyson & I. Buggy Co. v. A. & A. Ry.*, 17 I. C. C. 330.

⁸ *Pabst Brewing Co. v. Chicago, M. & St. P. Ry.*, 17 I. C. C. 359.

⁹ *Baker Mfg. Co. v. C. & N. W. Ry.*, 21 I. C. C. R. 605.

¹⁰ *Mfrs. & Merchants' Ass'n v. A. & A. R. R. Co.*, 28 I. C. C. 116.

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able.¹¹ However this may be, at all events no order will be entered for reparation because a refund erroneously made was in excess of amount of reparation upon basis of a rate found to be reasonable.¹² As against the carriers found in fault, reparation is divided in proportion of the divisions of the rate.¹³

§ 1058. Extent of the jurisdiction.

The Commission is authorized to award damages only when there has been a violation of the Act.¹⁴ The Commission has no power to direct the payment of a damage claim, since a failure to pay is not a violation of the Act.¹⁵ Still less has the Commission power to order prompt payment.¹⁶ The Commission has no authority to assess costs or to allow attorney's fees.¹⁷ And the Commission has no jurisdiction to award damages for icing charges resulting from carrier's delay.¹⁸ The Commission has no authority to award damages for negligence not constituting a breach of the Act.¹⁹ And, as has been seen, loss sustained through misquotation of rate is no proper ground for damages.²⁰ A change in rates on short notice, under authority of Commission, affords no basis for reparation.²¹ A failure of defendants to provide in their tariffs for the payment of redemption money on account of lost commutation tickets was held not unreasonable or otherwise in violation of the Act.²² That a shipper in some instances in the

¹¹ *National Wool Grower's Ass'n v. O. S. L. R. R.*, 25 I. C. C. 675.

¹² *W. E. Caldwell Co. v. C. I. & L. Ry.*, 20 I. C. C. R. 412.

¹³ *National Mfg. Co. v. Chicago G. W. Ry.*, 18 I. C. C. 370.

¹⁴ *Wisconsin Lime & Cement Co. v. C., C., C. & St. L. Ry.*, 25 I. C. C. 366.

¹⁵ *Larkin Co. v. E. & W. T. Co.*, 24 I. C. C. 645.

¹⁶ *Ponchatoula Farmers' Ass'n v. I. C. R. R.*, 19 I. C. C. 513.

¹⁷ *Washer Grain Co. v. M. P. Ry.*, 15 I. C. C. 147.

¹⁸ *Platten Produce Co. v. K. L. S. & C. Ry.*, 20 I. C. C. 543.

¹⁹ *Buffalo Hardwood Lumber Co. v. B. & O. S. W. R. R. Co.*, 21 I. C. C. 536.

²⁰ *Alabama Lumber & Export Co. v. P. B. & W. R. R.*, 19 I. C. C. 295.

²¹ *Wisconsin Lime & Cement Co. v. C., C., C. & St. L. Ry.*, 25 I. C. C. 366.

²² *Hill v. P. R. R.*, 25 I. C. C. 650.

past has paid less than a reasonable charge is no reason why he should not be awarded reparation in instances where unreasonable charges have been exacted from him.²³ In awarding reparation on the ground that an unreasonable rate was charged for the transportation of property for the Federal Government no account can be taken by the Commission of proper land-grant deductions, which may be determined between the parties as provided by law.²⁴

§ 1059. Damages to business generally.

It is not sufficient to sustain a claim for reparation to allege a general injury to business.²⁵ A finding of general damages by the Commission would be mere opinion, not conclusive upon courts, to which, in any event, resort must be had for decision of such a question.²⁶ The Commission feels that it has no jurisdiction to award damages for decline in market price of a commodity or for commissions for its sale.²⁷ No damages will, therefore, be allowed for loss of tenants and depreciation.²⁸ Damages due to inability to compete in common markets cannot become subject of reparation.²⁹ Loss of contracts and sales, resulting from car-distribution discrimination, are not, it seems, for the Commission to assess.³⁰ And the Commission is clear that exemplary damages are not within its province to grant.³¹ Damages will be denied a carrier not found to have unduly discriminated against complainant in distribution of cars.³² And likewise, damages will be

²³ *Crutchfield & Woolfolk v. S. P. Co.*, 24 I. C. C. 651.

²⁴ *United States v. S. P. Co.*, 25 I. C. C. 255.

²⁵ *Rogers & Co. v. P. & R. Ry.*, 112 I. C. C. 308.

²⁶ *Hillsdale Coal & Coke Co. v. P. R. R.*, 19 I. C. C. 53.

²⁷ *Hanley Milling Co. v. P. Co.*, 19 I. C. C. 475.

²⁸ *Mattison v. Pennsylvania R. R.*, 23 I. C. C. 233.

²⁹ *Sondheimer Co. v. I. C. R. R.*, 20 I. C. C. 606.

³⁰ *Jacoby & Co. v. P. R. R.*, 19 I. C. C. 392.

³¹ *Eichenberg v. S. P. Co.*, 28 I. C. C. 584.

³² *National Coal Co. v. B. & O. R. R.*, 28 I. C. C. 442.

denied on a complaint where there is no measure of damage.³³

§ 1060. Nature of the order.

An order of the Commission for payment is not judgment, nor does any lien result therefrom.³⁴ Indeed, an award of reparation is not enforceable as such; it is only enforceable as the basis for court decree.³⁵ No order will be entered pending the compliance of the carrier with views of Commission oftentimes.³⁶ And sometimes rates will be exposed to analysis and criticism of the respondents before the issuance of a final order.³⁷ A practice which is bad only because discriminatory can always be remedied by withdrawing the benefit from the favored party or by extending it to the injured parties.³⁸ An order to cease and desist from an unjust discrimination operates in the alternative; therefore the relation of rates may be prescribed but no definite rate fixed.³⁹ Where the rates to one point are unduly low no valid objection can be found to the removal of the discrimination by an increase of such rates.⁴⁰ But it is within power of Commission to end a discrimination as between points of origin by a reduction in the rate from a certain point that is discriminated against.⁴¹

§ 1061. How far party may reopen case.

It is generally true that the findings of the Commission will not conclude the unsuccessful party for all time. Conditions of transportation vary from time to time, and

³³ *Becker v. P. M. R. R.*, 28 I. C. C. 645.

³⁴ *Washer Grain Co. v. Missouri Pacific*, 15 I. C. C. 147.

³⁵ *Anadarko Cotton Oil Co. v. A., T. & S. F. Ry.*, 20 I. C. C. 43.

³⁶ *In re Investigation of Advances in Rates on Grain*, 21 I. C. C. 22.

³⁷ *In re Express Rates*, 28 I. C. C. 132.

³⁸ *New York C. & H. R. R. v. Interstate Commerce Commission*, 168 Fed. 131.

³⁹ *Freeman Lumber Co. v. St. L., I. M. & S. Ry.*, 19 I. C. C. 348.

⁴⁰ *In re Advances of Lumber*, 28 I. C. C. 686.

⁴¹ *Scott Paper Co. v. P. R. R.*, 26 I. C. C. 601.

rates should ordinarily be adjusted to such changed conditions, and it is possible, therefore, that the petitioners may be able to show that a change has taken place so that the contention which was formerly unsuccessful may now be reasonable and just.⁴² It is not to be understood, however, that the findings have no binding effect whatever. If a matter has once been investigated by the Commission and a finding made, the same question will not afterwards be differently decided unless new evidence is presented, even though it arises upon the complaint of other parties.⁴³ Questions coming before this body are not of a character that the decision in one case is necessarily controlling in all similar cases. Its decisions can hardly be said to have the effect of an estoppel, nor is there the same reason for applying the maxim *stare decisis* which exists in courts of law. In the absence of some showing that new conditions have intervened, or that the effects of the original holding have been other than were anticipated, we think that that case must control the disposition of this.⁴⁴ And upon the precise point litigated and decided the finding may be a complete bar to further proceedings before the Commission. The defendant, if the finding is against him, may disregard it, and the question must then be taken to the courts, where the finding is not binding. If the finding is against the complainant it is final; and in any case if the complainant has his option of suit or complaint to the Commission, his appeal to the Commission bars him from suit. So the final judgment in a suit or proceeding before the Interstate Commerce Commission, unreversed and remaining of record in full force and effect, is a bar to an action in the United States Circuit Court brought to recover damages from

⁴² *Rice v. Western N. Y. & P. R. R.*, 2 Int. Com. Rep. 496, 3 I. C. C. 87; *Interstate Commerce Com. v. Louisville & N. R. R.*, 73 Fed. 410, 5 Int. Com. Rep. 656.

⁴³ *Railroad Commissioners v. A., T. & S. F. Ry.*, 8 I. C. C. Rep. 304.

⁴⁴ *Kauffman Milling Co. v. Mo. Pac. Ry.*, 4 I. C. C. 417, 3 Int. Com. Rep. 400.

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the same violation of the Act to Regulate Commerce.⁴⁵

§ 1062. Finding of Commission does not work an estoppel.

The proceedings before the Commission not being strictly judicial, the doctrine of estoppel by judgment cannot properly be applied to the findings of the Commission.⁴⁶ The doctrine of estoppel of record does not seem applicable to the case under consideration. It is applied to the record and judgment of both general and inferior courts. The Commission is not a court. It is a special tribunal whose duties though largely administrative are sometimes semi or quasi-judicial. It is required to investigate and report. The law creating the Commission does not mention its final act as a judgment. It renders no judgment, enters no decree. From these considerations it is not believed that the rule of estoppel by record, at all times technical in character, can be invoked by the defendants.⁴⁷ The whole scope and spirit of the Act seems to stamp order of the Commission as in no sense final in the sense that the judgment of a court is final, except where the parties impressed by the wisdom and justice of the order acquiesce therein in cases like those here under consideration.⁴⁸ Even if the doctrine of estoppel by record can ever be applied to the findings of the Commission, it can only be done when the parties are the same. One who appeared before the Commission in a representative capacity as a member of a committee of a complaining mercantile society, in proceedings which were dismissed, is not thereby estopped in a similar case brought by him as an individual.⁴⁹

⁴⁵ *Riddle v. New York, L. E. & W. R. R.*, 3 Int. Com. Rep. 230.

⁴⁶ 3 Int. Com. Rep. 830, 5 I. C. C. 166.

⁴⁷ *Providence Rubber Co. v. Good-*

year, 76 U. S. 9 Wall. 788, 19 L. ed. 566.

⁴⁸ 94 U. S. 673, 24 L. ed. 168.

⁴⁹ *Toledo Produce Exch. v. Lake Shore & M. S. R. R.*, 3 Int. Com. Rep. 830, 5 I. C. C. 166.

§§ 1063, 1064] RAILROAD RATE REGULATION

§ 1063. The two-year rule.

Orders of the Commission, by a provision in the Act, may continue in force for a period not exceeding two years.⁵⁰ But conversely orders with respect to rates are not conclusive beyond the period of two years.⁵¹ Moreover, Congress left the door open to the Commission to suspend or modify or set aside any of its orders at any time within the two years.⁵² But under the Act an order of the Commission shall remain in force for two years unless a different time is designated.⁵³ A contention that if the Commission concludes a rate to be unreasonable it thereby automatically awards reparation covering the statutory period of two years prior to date of complaint, not sustained.⁵⁴ Two years from date the carrier may voluntarily put the old rate in force.⁵⁵ As a practical matter the advantage of submitting to a settlement in informal proceedings may be noted, as according to what is understood to be the current practice of the Commission, the order is made for one year, whereas in formal proceedings it will almost invariably run for two years.

§ 1064. New petition may be filed.

When new conditions have arisen since the original investigation and report of the Commission neither the parties, as has been seen, nor others, are bound by the former finding. It follows that the new conditions need not be presented in a petition for a rehearing; a new petition may be filed, and this would seem to be the better course. This is clearly true where the parties to the new application were not parties to the former complaint; the new parties should file a new complaint, and if upon this new complaint it should appear that any conclusion in the former case

⁵⁰ *Douglas & Co. v. C., R. I. & P. Ry.*, 21 I. C. C. 97.

⁵¹ *National Hay Ass'n v. M. C. R. R.*, 19 I. C. C. 34.

⁵² *National Hay Ass'n v. M. C. R. R.*, 19 I. C. C. 34.

⁵³ *N. Y. C. & H. R. R. v. Int. Com. Com.*, 168 Fed. 131.

⁵⁴ *New Pittsburg Coal Co. v. H. V. Ry.*, 26 I. C. C. 121.

⁵⁵ *Thely Grain Co. v. F. S. & W. R. R.*, 16 I. C. C. 28.

so decided has been erroneous, the Commission would feel it to be a duty to correct such conclusion.⁵⁶ When a question of general public interest is involved, the Commission, in its own discretion and in furtherance of justice, may open a case to give parties the benefit of a more extended investigation of the same subject-matter; and this was done in a case where other parties in the same business had filed similar petitions, and the question was to be thoroughly reconsidered in connection with these other petitions.⁵⁷ A petition or motion for rehearing cannot be granted on mere allegation of error in the findings of fact; and such a petition or motion must be supported by proof of new facts or by specifically pointing out facts already in evidence showing *prima facie* at least that there was such error.⁵⁸ It is clear that any order the Commission may make must be at all times subject to modification by it.⁵⁹ The Commission has now complete power to suspend or modify its orders.⁶⁰ It should be noted that, so far as the question of power is concerned, that has been given to the Commission in the clearest possible manner in the Act as amended.

§ 1065. Reopening a case for rehearing.

An application to the Commission to reopen a case for rehearing is addressed to its discretion, like a similar application to a court; and will be decided upon the same considerations. A petition to reopen a case that has been decided, and for a rehearing, should show *prima facie* that some material testimony has been overlooked or misapprehended, or some error in the findings of fact or conclusions of law.⁶¹ So a case before the Commission will not

⁵⁶ Re Petition of Toledo Produce Exchange, 2 Int. Com. Rep. 412, 2 I. C. C. 588. D. R. Ry., 3 Int. Com. Rep. 374, 4 I. C. C. 87.

⁵⁷ Rice v. Western N. Y. & P. R. R., 2 Int. Com. Rep. 496, 3 I. C. C. 87. ⁵⁸ City of Spokane v. N. P. Ry., 21 I. C. C. R. 400.

⁵⁹ Loftus v. Pullman Co., 19 I. C. C. 102.

⁶⁰ Proctor v. Cincinnati, H. & ⁶¹ Myers v. Pennsylvania Co., 2 Int. Com. Rep. 544.

be reopened in a supplementary proceeding brought simply to secure reparation, for the purpose of ruling on questions not decided in the original case, where the petition for reparation was not filed until long after the original decision had been rendered and the offending carrier had complied therewith.⁶² And after a complaint upon elaborate pleadings and proofs has been heard and determined by the Commission, an application for a rehearing, made only by those who were not parties to the proceeding, will not be granted.⁶³ The Commission, however, will grant a rehearing if it is in the interests of justice. This may be the case, even though the finding of the Commission has been reviewed by the courts. In the one case⁶⁴ it appeared that the Circuit Court had refused to enforce the original order of the Commission, the Commission reopened the case, granted a rehearing, and modified its order, and renewed the order with this modification. If upon a rehearing of a case before the Commission, additional evidence warrants a finding contrary to what appeared and was found in the original hearing, the former order may be vacated.⁶⁵ The general principle upon which petitions for rehearing would be dealt with was stated by the Commission in the first case of the sort,⁶⁶ to be that when it had patiently and laboriously sifted out all the material facts necessary to fairly and justly present the merits of the controversy, with its conclusions thereon, the Commission had done all that the statute authorizes or requires it to do.

⁶² *Rice v. Western N. Y. & P. R. R.*,
6 I. C. C. Rep. 455.

⁶³ *Re Petition of Toledo Produce
Exchange*, 2 Int. Com. Rep. 412,
2 I. C. C. 588.

⁶⁴ *Page v. Delaware, L. & W. Ry.*,
6 I. C. C. Rep. 548.

⁶⁵ *Bates v. Pennsylvania R. R.*,
3 Int. Com. Rep. 296, 4 I. C. C. 281.

⁶⁶ *Riddle v. Pittsburg & L. E. R. R.*,
1 Int. Com. Rep. 773, 1 I. C. C. 490.

CHAPTER XXIII

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§ 1070. Provisions of the Act.

By section 13 which names the parties who may have recourse to the Commission it is provided that any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this Act, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts. Thereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to

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have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper. The Commission shall, in like manner and with the same authority and powers, investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory at the request of such commissioner or commission, and the Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of the Act, or concerning which any question may arise under any of the provisions of the Act, or relating to the enforcement of any of the provisions of this Act. The Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money. And by explicit provision no complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

§ 1071. Conduct of the proceedings.

In regard to procedure before the Commission it is provided that the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. The Commission may, from time to time, make or amend such general

rules or orders as may be requisite for the order and regulation of proceedings before it, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States. Any party may appear before said Commission and be heard, in person or by attorney, and the Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work or for proper representation of the public interests in investigations made by it or cases or proceedings pending before it, whether at the Commission's own instance or upon complaint. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of either party interested. A majority of the Commission shall constitute a quorum and either of the members of the Commission may administer oaths and affirmations and sign subpoenas. The copies of schedules and classifications and tariffs of rates, fares, and charges, and of all contracts, agreements, and arrangements between common carriers filed with the Commission as herein provided, and the statistics, tables, and figures contained in the annual or other reports of carriers made to the Commission as required under the provisions of this Act shall be preserved as public records in the custody of the secretary of the Commission, and shall be received as *prima facie* evidence of what they purport to be for the purpose of investigations by the Commission and in all judicial proceedings. In this connection it should be noted, that the current Rules of Practice governing proceedings before the Commission are printed in the Appendix to this volume.

Topic A. Proceedings Before the Commission

§ 1072. Procedure in regular course.

The practice and procedure of the Commission has from the first been made as simple as possible, consistent with justice. It desires that without dilatory motions, pleas in

abatement or other interlocutory proceedings, the matter in question may be brought to an issue at the earliest practicable day when a final hearing may be had forthwith, and all proper questions will then be entertained, whether jurisdictional or going to the merits of the controversy. The Commission will decline to take up any motion, the object of which is to reach the merits of the case and have them discussed and passed upon summarily, instead of at the customary hearing.⁶⁷ In accordance with this view, the Commission desires counsel to simplify the issues so far as possible by agreeing upon facts involved. The first chairman, Judge Cooley, wrote in a letter in connection with a petition of the Boards of Trade Union of Minnesota,⁶⁸ that "the major portion of the facts are not in dispute at all, and as to all such facts we are compelled to insist that counsel shall stipulate them in advance. In such a case as this, the facts must be largely matters of public notoriety, and it would be altogether wrong to calculate upon taking up time to prove them by oral evidence. An agreement upon them should be all ready before we take up the case. Of course it would not be expected parties should agree upon the consequences flowing from the facts, but even as to these it is not generally necessary to go into proof as in a suit at law, for the Commission will apply its own judgment where all that is requisite is an application of ordinary common sense, and will not require or expect that evidence be adduced to show that usual results have followed."

§ 1073. Scope of the proceedings enlarged.

It is recognized also by the courts that, unless the requirement of the Constitution that there shall be in any action of any department of the government due process of law is substantially denied, an administrative body is not to be held to the rigorous limitations of a judicial

⁶⁷ *Associated Wholesale Grocers v. Missouri Pac. R. R.*, 1 Int. Com. Rep. 321, 1 I. C. C. 156.

⁶⁸ 1 Int. Com. Rep. 446.

tribunal. The case of Cincinnati, Hamilton & Dayton Railroad v. Interstate Commerce Commission⁶⁹ is the leading case to the effect that the Commission is not confined to taking action responsive to the pleadings with which the proceedings were originally begun. It was held in that case that the Commission, in making an investigation on complaint of a shipper, has in the public interest the power, disembarrassed by any supposed admissions contained in the statement of the complaint, to consider the whole subject and the operation of the new classification complained of in the entire territory. If the Commission finds a new classification of rates engenders discrimination it has power on its own motion to prohibit the further enforcement of the same. The explanation of all this, as has been seen in another connection, is that the Commission has combined in its constitution two functions; as administrative body it may institute proceedings, but it passes upon the matters thus brought before it quasi-judicially.⁷⁰ It should be noted, however, that within the range of its discretion in determining the reasonableness of rates it is entitled to select the testimony which it will rely upon according as it addresses itself to the discriminating judgment of the Commission, as was pointed out in Louisville & Nashville Railroad v. Interstate Commerce Commission.⁷¹

§ 1074. Course of the pleadings.

The Commission should exhaust its activities in developing pertinent facts necessary to full investigation and hearing of complaints. Even if complainant asks only reparation the Commission in deference to rights of public may take up the existing rate.⁷² Where full hearing has been had the Commission in its discretion may if it feels nec-

⁶⁹ 206 U. S. 142, 27 Sup. Ct. 648.

⁷¹ 195 Fed. 541.

⁷⁰ Quammen & Austad Lumber Co. v. C., M. & St. P. Ry., 19 I. C. C. 110.

⁷² Acme Cement Plaster Co. v. Union Pacific R. R., Unrep. Op. 41.

essary establish rates to points not in the original complaint.⁷³ The filing by defendant carriers of an application for relief from the operation of section 4 does not preclude a determination by the Commission of a complaint under section 3.⁷⁴ However, the normal course under the advance in rates suspension clause would be that, while the rates protested against might be condemned, the rates against which there was no protest would be allowed to go into effect.⁷⁵ In regular course of business the complaint must be presented in a verified petition; and the complainant will be bound by the form of his complaint.⁷⁶ A carrier who avers in defense substantial dissimilarity in circumstances and conditions as justification, is concluded by its pleading, and must affirmatively show that the circumstances and conditions are in fact substantially dissimilar; but upon an application for relief under section 4 the carrier is not limited by such a rule of evidence, and may present to the Commission every material reason for an order in its favor.⁷⁷ The theory of the Commission is that a complaint is not to be regarded strictly as an action at law, but rather as an appeal against illegal action.⁷⁸

§ 1075. Raising the question of jurisdiction.

The Commission being an administrative body, need not first determine whether the subject-matter of a complaint is within its jurisdiction before it considers the merits of a controversy; but affirmative relief may not be granted in any case unless jurisdiction over the subject-matter is definitely ascertained. Without determining the question of jurisdiction, therefore, it may analyze the facts presented, and if sufficient to grant relief, dismiss the

⁷³ Florida Fruit & Vegetable Ass'n v. Atlantic C. L. R. R., 17 I. C. C. 552.

⁷⁴ Mayor & Council of Boston v. A. C. L. R. R., 24 I. C. C. 50.

⁷⁵ In re Advances on Fruits and Vegetables, 24 I. C. C. 104.

⁷⁶ Re Southern Pac. R. R., 1 Int. Com. Rep. 16, 1 I. C. C. 6.

⁷⁷ Trammell v. Clyde Steamship Co., 4 Int. Com. Rep. 120, 5 I. C. C. 324.

⁷⁸ New Pittsburg Coal Co. v. H. V. Ry., 26 I. C. C. 121.

complaint.⁷⁹ And where a broad question is intended to be raised, the Commission has ruled that it should be in some comprehensive proceeding to which the railroads responsible for the situation can be made parties.⁸⁰ And in general the Commission will as a matter of practice decline to give a preliminary hearing upon a motion to dismiss for lack of jurisdiction.⁸¹ Jurisdiction is a fundamental fact which can be raised at any stage of the proceedings before determination of the issues; and it follows from the character of this defense that jurisdiction cannot be conferred by stipulation of parties.⁸²

§ 1076. Individual rate during general inquiry.

In accordance with these general principles, the Commission will not think it desirable to undertake to pass upon an individual rate during general inquiry.⁸³ In such a general inquiry the Commission may deal with rates notwithstanding all parties affected are not in; but no order can be addressed to a carrier omitted as a defendant.⁸⁴ At the conclusion of such a general inquiry very often only a general readjustment will be outlined and the particular complaints by which it was occasioned dismissed without prejudice.⁸⁵ While the law casts upon the respondents the burden of showing that the increased rates are reasonable, the parties at whose instance suspensions are ordered should present to the Commission all facts which, in their opinion, tend to show that the increases should be allowed.⁸⁶ Where a broad question is intended to be raised, it should be in some comprehensive

⁷⁹ *Mattison v. Penn. Co.*, 23 I. C. C. 233.

⁸⁰ *In re Advances in Class Rates*, 25 I. C. C. 268.

⁸¹ *Associated Wholesale Grocers v. Mo. P. R. R.*, 1 Int. Com. Rep. 321, 1 I. C. C. 156.

⁸² *La Salle B. C. R. R. v. C. & N. W. Ry.*, 13 I. C. C. 610.

⁸³ *Hydraulic Press Brick Co. v. Vandalia R. R.*, 15 I. C. C. 175.

⁸⁴ *Cedar Hill Coal & Coke Co. v. Atchison, T. & S. F. R. R.*, 15 I. C. C. 73.

⁸⁵ *Oklahoma v. Atchison, T. & S. F. R. R.*, 14 I. C. C. 147.

⁸⁶ *Commodity Rates between Missouri River Points*, 28 I. C. C. 265.

proceeding to which the railroads responsible for the situation can be made parties.

§ 1077. Statement of the wrong.

It is fundamental that the complaint shall state the facts with such clearness that the Commission may apprehend the point in issue, and defendant may be adequately advised of the thing which it is called upon to answer and defend.⁸⁷ Although no form for drafting the complaint is particularly described, the thing found fault with must definitely appear.⁸⁸ And to make out a case for relief under the Act, all the circumstances bearing on the questions involved should be presented.⁸⁹ Thus a mere allegation that the rates charged violate certain sections of the Act, unaccompanied by any description of the character of the discrimination, nor any prayer for their correction, is not sufficient to try the question of discrimination.⁹⁰ A complainant should seasonably state his claim for damages with sufficient definiteness to advise the Commission and the carrier of the nature of the claim.⁹¹ But whether a discrimination shall be removed is not measured by its amount, whether large or small, but by whether it is undue.⁹² As a matter of practice different complaints all on the same basis should be combined in one complaint.⁹³ And, while a general description would be sufficient in a complaint involving rates to numerous destinations which have been attacked, such general language would be held insufficient in a case where damages are claimed on account of some specific transactions in the past.⁹⁴

⁸⁷ *Augusta & Savannah Steamboat Co. v. O. S. S. Co. of Savannah*, 26 I. C. C. 380.

⁸⁸ *Florida Fruit & Vegetable Ass'n v. Atlantic C. L. R. R.*, 17 I. C. C. 552.

⁸⁹ *Quammen & Austad Lumber Co. v. C., M. & St. P. Ry.*, 19 I. C. C. 110.

⁹⁰ *United States Leather Co. v. S. Ry.*, 21 I. C. C. 323.

⁹¹ *Mountain Ice Co. v. D., L. & W. R. R.*, 21 I. C. C. 45.

⁹² *Fort Dodge Commercial Club v. I. C. C.*, 16 I. C. C. 572.

⁹³ *Hayden & W. Lumber Co. v. Gulf & S. I. R. R.*, 14 I. C. C. 540.

⁹⁴ *Mountain Ice Co. v. D., L. & W. R. R.*, 21 I. C. C. 45.

§ 1078. Sufficiency of the complaint.

While the Commission is extremely liberal in construing pleadings, the Act necessarily implies that carriers shall be notified of the complaint which they are required to answer; and although no particular form is insisted upon, there must be a statement of the thing which is claimed to be wrong sufficiently plain to put the carrier upon its defense.⁹⁵ It is not a matter of form, but of substance; even a letter setting forth sufficiently the nature of claim is enough to take rank as a complaint.⁹⁶ And any general allegations in regard to a shipment showing the point of origin and destination, the consignor and consignee and the commodity and the billing are sufficient to constitute a filing of a complaint.⁹⁷ There are no technicalities insisted upon in drawing complaints;⁹⁸ it is simply necessary to tell a straight-forward story; for the Commission never looks to the niceties of pleading. The mere fact that the word "overcharge" is used instead of "unreasonable exaction" will not be permitted to interfere with a trial of the substantial issue presented.⁹⁹ As was said in one case, it was sufficient if the complaint states enough to put in issue a charge of undue prejudice.¹ But a complaint against all rates between two points is not sufficient; there must be specific attack upon specific rates.² However, although a complaint is apparently indefinite, if it can be made definite at the hearing that will be enough.³ And in one proceeding an inference was drawn that the intention was to attack rates in both directions, though the complaint did not so specify.⁴ A complaint showing

⁹⁵ *United States Leather Co. v. S. Ry.*, 21 I. C. C. 323.

⁹⁶ *Gamble-Robinson Commission Co. v. St. L. & S. F. R. Ry.*, 19 I. C. C. 114.

⁹⁷ See *Mountain Ice Co. v. D., L. & W. R. Ry.*, 21 I. C. C. 45.

⁹⁸ *Memphis Freight Bureau v. St. Louis S. W. Ry.*, 18 I. C. C. 67.

⁹⁹ *Clinton Refining Co. v. C. & N. W. Ry.*, 28 I. C. C. 364.

¹ *Union Tanning Co. v. S. P. Co.*, 25 I. C. C. 112.

² *City of Spokane v. N. P. Ry.*, 19 I. C. C. 162.

³ *Oskosh Logging Tool Co. v. Chicago & N. W. Ry.*, 14 I. C. C. 109.

⁴ *Beall v. W. A. & M. V. Ry.*, 20 I. C. C. 406.

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date and weight of shipment, with allegation of unreasonableness of rate charged the complainant, is sufficient.⁵ But a complaint against a rate "to Boston, New York and Eastern points" will only cover Boston and New York—"Eastern points" is too indefinite.⁶

§ 1079. Answers in defense.

An answer which sets up a justification must clearly advise complainants of the facts and circumstances relied on as constituting such justification.⁷ Under the rules of practice issued by the Commission, a replication to an answer is not required or allowed.⁸ Matter which is not expressly in issue by the pleadings or necessarily involved in issues presented in a strictly *inter partes* case instituted by complaint before the Commission cannot be authoritatively determined by it.⁹ But technical defenses have no place before the Commission, and will not be permitted to defeat the broad principles of the Act.¹⁰ It should be noted that section 13 requires that every carrier complained of shall be supplied with a copy of complaint, and given an opportunity to answer.¹¹ Oftentimes upon an examination of complaints, the Commission will request a conference between carriers and shippers to see if under its guidance arrangements satisfactory to all concerned may not be worked out.¹²

§ 1080. Amendment to complaint.

The Interstate Commerce Commission is liberal in allowing amendments to complaints, but will not allow

⁵ *Riverside Mills v. G. R. R.*, 20 I. C. C. 423.

⁶ *Kiser Co. v. Central of Ga. Ry.*, 17 I. C. C. 430.

⁷ *Raworth v. Northern P. R. R.*, 3 Int. Com. Rep. 857, 5 I. C. C. 234.

⁸ *Oregon S. L. Ry. v. Northern P. R. R.*, 2 Int. Com. Rep. 639, 3 I. C. C. 264.

⁹ *Commercial Club v. Chicago, R. I. & P. R. R.*, 6 Int. Com. Rep. 647.

¹⁰ *Flour City S. S. Co. v. L. V. R. R.*, 24 I. C. C. 179.

¹¹ *Fels & Co. v. Pennsylvania R. R.*, 23 I. C. C. 483.

¹² *Potato Shipments in Winter*, 26 I. C. C. 681.

one that would be in effect making a new case.¹³ A complaint against a railroad company stating that it had been previously in the hands of a receiver, was allowed to be amended so as to show existence of receivership which it appeared on hearing was still in existence.¹⁴ But the Commission does not favor a practice of ingrafting an application for through routes and joint rates upon a claim for reparation.¹⁵ Where a complaint as filed did not ask reparation, but at the hearing a request for leave to amend in that respect was noted in the record, and there being no evidence touching specific shipments, that feature of case not considered by the Commission in disposing of the case.¹⁶ Improper complaints cannot be cured by amendment so as to come within its scope.¹⁷ Thus if not asked in the complaint through rates cannot be asked in an amendment.¹⁸ It is not unheard of for an amendment of a complaint to be permitted after the hearing.¹⁹ But when the two-year period has elapsed, the jurisdiction of Commission cannot be restored by amendment.²⁰

§ 1081. Responsiveness to pleadings.

In accordance with the general principles under discussion, no order will be made where there is no complaint covering the issue.²¹ Thus where there was no complaint in regard to any violation of the long and short haul clause, it was held that this possibility cannot be

¹³ Delaware State Grange v. New York, P. & N. R. R., 2 Int. Com. Rep. 187, 2 I. C. C. 309; Riddle v. Baltimore & O. R. R., 1 Int. Com. Rep. 701, I. C. C. 372.

¹⁴ Reynolds v. Western New York & P. Ry., 1 Int. Com. Rep. 685, 1 I. C. C. 347.

¹⁵ La Salle & B. County R. Co. v. Chicago & N. W. R. Co., 11 I. C. C. 610.

¹⁶ Atchison v. St. L., I. M. & S. Ry., 22 I. C. C. 131.

¹⁷ Michigan H. M. Ass'n v. Transcontinental Freight Bureau, 27 I. C. C. 32.

¹⁸ La Salle & B. C. R. R. v. C. & N. W. R. R., 13 I. C. C. 610.

¹⁹ People's Fuel & S. Co. v. Gt. W. Ry., 27 I. C. C. 24.

²⁰ Werner S. M. Co. v. Ill. C. Ry., 17 I. C. C. 380.

²¹ Refuge Cotton Oil Co. v. St. L., I. M. & S. Ry., 27 I. C. C. 117.

considered in a petition attacking the reasonableness, relatively and *per se*, of the rates in question.²² Upon a complaint alleging undue preference, where the new tariffs are suspended, the question of the reasonableness *per se* of the rates is automatically imported into the case.²³ But in a complaint not attacking the reasonableness of a rate *per se*, no conclusion on that point can be reached by Commission.²⁴ And where at a hearing for the first time a claim was made that wool rates in different parts of New England were not properly adjusted, it was held that this should have been duly called to the attention of the Commission by a proper complaint.²⁵ On the other hand, it is the duty of the Commission as an administrative body to pass upon all rates presented in a complaint.²⁶ And conversely where specific rates are attacked the Commission generally speaking will confine the inquiry to them.²⁷ While stations named in complaint may furnish a guide to the proper adjustment of the remaining stations, the Commission must necessarily confine itself to the pleadings, and make no finding concerning rates to the remaining stations.²⁸ As has already been pointed out, unless reasonableness of rates is raised by the complaint, no finding thereon will be made.²⁹ In view of the policy of the Act, reasonableness and reparation should be combined in one complaint.³⁰ If a reduction of rates is asked and favorably acted upon by the Commission, the complainant cannot later file a complaint in another case, asking for reparation for past exactions.³¹ Where the statements as filed showed overcharges, but bills of lad-

²² Chamber of Commerce of Augusta v. S. Ry., 22 I. C. C. R. 233.

²³ Douglas & Co. v. C., R. I. & P. Ry., 21 I. C. C. R. 97.

²⁴ Holland Blow Stave Co. v. A. C. L. R. R., 24 I. C. C. 81.

²⁵ Massachusetts-Maine Wool Rates, 28 I. C. C. 396.

²⁶ Eastern Case, 20 I. C. C. 243.

²⁷ Sanford v. Western Express Co., 16 I. C. C. 32.

²⁸ Omaha Grain Exchange v. C., R. I. & P. Ry., 28 I. C. C. 680.

²⁹ Davies v. Louisville & W. R. R., 18 I. C. C. 540.

³⁰ Delray Salt Co. v. M. C. R. R., 18 I. C. C. 247.

³¹ West Texas Fuel Co. v. Texas & P. Ry., 17 I. C. C. 491.

ing produced in evidence covering shipments showed no overcharge, there is no basis for an order by the Commission presented by the pleadings.³² The fact that the issue raised by the petition is not as broad as it might have been if other carriers had been made parties, can furnish no warrant for a refusal to pass upon matters clearly embraced within it.³³ But with only one carrier as party defendant, issue cannot be broadened to embrace matters which were brought into existence by other carriers, and for which defendant alone is in no sense responsible.³⁴

§ 1082. Application for relief.

A general or blanket application for relief from section 4 will be held sufficient by the Commission, there being nothing in the clause prescribing the form, contents, or breadth of the application to be filed thereunder.³⁵ But the filing by a carrier of an application for relief from section 4 does not preclude a determination of a complaint under section 3 involving the same general territory.³⁶ A holding by the Commission that rates in general are reasonable, does not preclude complaint of the consideration of particular rates.³⁷ A complainant should not attack one rate with idea of later complaining thereafter if successful that through rates are greater than sum of locals.³⁸ But a fourth section application will be considered with complaint attacking rates covered by application.³⁹ If only reparation is asked there will be no action directed against the maintenance of the present rate.⁴⁰ Awards of reparation by the Commission are based upon violations of the Act in the past, not for pres-

³² *Esson Granite Co. v. S. Ry.*, 26 I. C. C. 449.

³³ *Chattanooga Feed Co. v. A. G. S. R. R.*, 22 I. C. C. 480.

³⁴ *Ibid.*

³⁵ *Southern Furniture Mfrs. Ass'n v. S. Ry.*, 25 I. C. C. 379.

³⁶ *Mayor & Council of Boston v. A. C. L. R. R.*, 24 I. C. C. 50.

³⁷ *Ferguson Saw Mill Co. v. St. Louis, I. M. & S.*, 18 I. C. C. 391.

³⁸ *National Petroleum Ass'n v. Chicago, M. & St. P. Ry.*, 14 I. C. C. 284.

³⁹ *Board of Trade of Morristown v. A. C. L. R. R.*, 24 I. C. C. 372.

⁴⁰ *Gamble Robinson Co. v. No. Pac. Ry.*, 14 I. C. C. 523.

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ent violations thereof.⁴¹ And the Commission will generally dismiss a complaint where the carrier has voluntarily done all that the Commission would order it to do.⁴²

§ 1083. Informal complaint.

An informal complaint showing date and weight of shipment, with allegation of unreasonableness of rate collected, is sufficient.⁴³ And for this purpose an informal letter containing all the elements of a claim is enough.⁴⁴ Commission holds that as it is an administrative body, it is not limited strictly by rules generally prevailing in the courts as to pleadings.⁴⁵ Thus any memorandum filed, setting forth the nature of the claim and expense bills, showing shipments and amount paid, is sufficient.⁴⁶ Neither the Act nor the rules of the Commission prescribe what act or acts shall constitute filing of claim for reparation.⁴⁷ The initiation of informal proceedings puts the matters in the hands of the Commission.⁴⁸ For example, after the institution of informal proceedings the matter cannot be adjusted merely by stipulation of the parties.⁴⁹ Protest at the time is not necessary for the maintenance of a proceeding for subsequent reparation, as the Commission has power to make things right for past exactions as an ancillary power to its general jurisdiction to revise rates.⁵⁰

§ 1084. Complainant not coming with clean hands.

The defendant has sometimes objected to the main-

⁴¹ *St. Louis Blast Furnace Co. v. V. Ry.*, 24 I. C. C. 360.

⁴² *Alan Wood Iron & Steel Co. v. P. R. R.*, 24 I. C. C. 27.

⁴³ *Riverside Mills v. G. R. R.*, 20 I. C. C. 423.

⁴⁴ *Fiske & Sons v. B. & M. R. R.*, 19 I. C. C. 299.

⁴⁵ *Nollenberger v. Missouri Pacific Ry.*, 15 I. C. C. 595.

⁴⁶ *Gamble-Robinson Commission*

Co. v. St. L. & S. F. R. R., 19 I. C. C. 114.

⁴⁷ *Marian Coal Co. v. D., L. & W. R. R.*, 27 I. C. C. 441.

⁴⁸ *Ocheltree Grain Co. v. Chicago R. R. & P.*, 13 I. C. C. 238.

⁴⁹ *Swift & Co. v. Chicago & A. R. R.*, 16 I. C. C. 426.

⁵⁰ *National Refining Co. v. Atchison, T. & S. F. R. R.*, 18 I. C. C. 389.

tenance of the complaint on the ground that the complainant did not come before the Commission with clean hands. Thus in one case before the courts of law,⁵¹ there was involved an order of the Commission forbidding the enforcement by defendants therein of a rule whereby they reserved to themselves, as initial carriers, the right of routing citrus traffic beyond their own lines and denied this privilege to shippers. The defendants contended that, even if the rule was unlawful, the complainants (shippers) were not entitled to relief, because they had used the privilege of routing for the purpose of securing rebates and desired to retain it for that purpose. In overruling this contention the court said: "With reference to defendants' contention, that the complainants before the Interstate Commerce Commission were there with unclean hands, it is only necessary to say, that, in this court, the Commission represents the public at large and therefore no participation by said complainants in the unlawful practice of rebates could bar relief."⁵² The public interested includes consignees, consumers and others, as well as shippers and producers or manufacturers.⁵³ *A fortiori* the fact that others associated with the complainants are acting illegally will not affect the validity of the complaint. Thus the fact that the members of a corporation organized to promote the marketing of livestock at a given city are violating the anti-trust law will not prevent the corporation from maintaining a proceeding to correct an unreasonable freight rate on livestock shipped to such city.⁵⁴ So the fact that a certain association constitutes an illegal monopoly will not affect the right of certain members of the association, constituting but a portion of its membership, to complain.⁵⁵

⁵¹ Interstate Commerce Commission v. Southern Pacific Co., 132 Fed. 829.

⁵² Compare Mitchell Coal & Coke Co. v. Penna. R. R., 181 Fed. 403, discussed in the next section.

⁵³ Chicago Livestock Exch. v. Ch. Gt. W. Ry., 10 I. C. C. Rep. 428.

⁵⁴ Cattle Raisers' Ass'n v. F. W. & D. C. R. R., 7 I. C. C. Rep. 513.

⁵⁵ Tift v. So. Ry., 10 I. C. C. 548.

§ 1085. Scope of the doctrine.

On the other hand, the illegality of the demand of the complainant may be so directly involved in the recovery he asks as to bar him. Thus no reparation will be ordered for ceasing to give unpublished privileges.⁵⁶ And for a complainant to have a standing to demand reparation the lawful charges must have been paid by him.⁵⁷ There are cases which unquestionably compel a peremptory dismissal, although the Commission does not inquire into equities not connected with the issue before it.⁵⁸ And if the complainant has fraudulently acted in other transactions, the complaint will be dismissed.⁵⁹ Of course, a demand should be denied, when to grant it would result in discrimination against the complainant's competitors.⁶⁰ If it be shown that a rival is getting rebates,⁶¹ suit may be brought although the complainant was cognizant thereof. But where a shipper has himself enjoyed an unlawful rate, he cannot recover for unjust discrimination against a carrier for giving a competitor on like shipment a lower rate.⁶²

Topic B. Parties to the Proceedings

§ 1086. Person interested as complainant.

Only a person interested in his own right can file a complaint. Thus a coal operator not being damaged by the failure of a railroad company to establish a rate upon a class of coal not produced at his mine, cannot complain of such a rate.⁶³ The person aggrieved should complain in his own name; a complaint by a ticket broker having

⁵⁶ National Lumber Co. v. S. P. L. A. & St. R. R., 15 I. C. C. 434.

⁵⁷ Peale, P. & R. v. Central R. R. of N. J., 18 I. C. C. 25.

⁵⁸ Lum v. G. N. Ry. Co., 21 I. C. C. 558.

⁵⁹ Sligo Iron Store Co. v. Atchison, T. & S. F. R. R., 17 I. C. C. 139.

⁶⁰ Minneapolis Threshing Machine Co. v. St. P., M. & O. Ry., 17 I. C. C. 189.

⁶¹ Mitchell Coal & Coke Co. v. Pennsylvania R. R., 181 Fed. 403.

⁶² Penn. R. R. Co. v. International Coal Mining Co., 173 Fed. 1.

⁶³ McGrew v. Missouri Pac. R. R., 8 I. C. C. Rep. 630.

no interest in the transaction will not be entertained.⁶⁴ But as interest of the petitioner, by the provision of the Act, need not be direct, cases cannot be dismissed because complainant shows no damage.⁶⁵ Therefore, the defendants are not entitled to a dismissal of a complaint of unlawful rates, on the ground that the petitioners, being merely commission merchants, can sustain no direct or material damage under the rates in question.⁶⁶ If a complainant dies after his complaint is filed, his representatives may be substituted as complainants.⁶⁷ And a complaint may be brought by successor to corporation which was the original shipper.⁶⁸ Whether an assignee can maintain proceedings in his own name to recover reparation was formerly not clear.⁶⁹ But more recently an assignee has been allowed to recover damages.⁷⁰

§ 1087. Requisites in this regard.

The fact that the complainant has not made a shipment and possibly may not be able to make a shipment for two years, is no ground for dismissing a complaint.⁷¹ That a complaining steamship corporation has no vessels, and that its stock is not paid in, is no objection to its rights to obtain from the Commission a ruling as to whether such company will be made a party to through routes when it is able to transport.⁷² The Commission is not deprived of jurisdiction to consider the merits of the controversy, merely because delegation to the officers presenting the complaint of the right to do so in the name

⁶⁴ *Otlinger v. So. Pac. R. R.*, 1 I. C. C. Rep. 604.

⁶⁵ *Indianapolis Freight Bureau v. Pa.*, 15 I. C. C. 567.

⁶⁶ *James v. Canadian P. R. R.*, 4 Int. Com. Rep. 274, 5 I. C. C. 612; *Milk Producers' Protective Ass'n v. Delaware, L. & W. Ry.*, 7 I. C. C. Rep. 92; *Central Y. P. Ass'n v. Vicksburg, S. & P. R. R.*, 10 I. C. C. Rep. 193.

⁶⁷ *Bulah Coal Co. v. P. R. R.*, 20 I. C. C. 52.

⁶⁸ *Wood-Mosaic Flooring & Lumber Co. v. L. & N. R. R.*, 22 I. C. C. 458.

⁶⁹ *O'Brien Commercial Co. v. C. & N. W. Ry.*, 20 I. C. C. 1080.

⁷⁰ *Jubitz v. S. P. Co.*, 27 I. C. C. 44.

⁷¹ *Lum v. G. N. Ry.*, 21 I. C. C. 588.

⁷² *Flour City S. S. Co. v. L. V. R. R.*, 24 I. C. C. 179.

of the United States is not affirmatively shown.⁷³ And clearly relief cannot be denied merely because of the suggestion advanced that other persons or places might be induced to seek like relief.⁷⁴ Regardless of the standing of the original complainant, if subsequently letters are received from shippers asking to be made co-complainants, before submission of the case, it has been held that under all the circumstances proper parties were before Commission.⁷⁵ In a recent proceeding a complaint against Rule 15 of Official Classification, as to a matter strictly *inter partes*, was dismissed because the issues presented were too broad and important to interests not parties.⁷⁶ No other manufacturers having joined in the complaint, or made independent complaint, it is nevertheless possible that they may be materially affected by a disturbance of adjustment that has continued for so many years.⁷⁷ The party at whose instance a proceeding is brought should be represented by some one able to give full and specific information as to the nature and extent of its business and specific commodity it handles.⁷⁸

§ 1088. Complaint by an association.

A corporation whose object is to promote the marketing of livestock at Chicago in the interest of its members may, under section 13, maintain a proceeding to correct an unreasonable freight rate on livestock shipped to Chicago, as its members, for whose general benefit and protection it was formed, have a vital interest in such a proceeding.⁷⁹ So a Milk Producers' Association, whether

⁷³ *United States v. U. P. R. R.*, 28 I. C. C. 518.

⁷⁴ *Casassa v. P. R. R.*, 24 I. C. C. 629.

⁷⁵ *Cincinnati & Columbus Traction Co. v. B. & O. S. W. R. R.*, 20 I. C. C. 486.

⁷⁶ *Kleibacker v. L. & N. R. R.*, 22 I. C. C. 420.

⁷⁷ *National Syrup Co. v. C. & N. W. Ry.*, 28 I. C. C. 673.

⁷⁸ *R. R. Com. of Montana v. N. P. Ry.*, 26 I. C. C. 407.

⁷⁹ *Cattle Raisers' Ass'n v. Fort Worth & D. C. R. R.*, 7 I. C. C. Rep. 513; *Chicago Livestock Exchange v. Chicago G. W. R. R.*, 10 I. C. C. Rep. 428.

representing its own members, or specially authorized to represent other shippers, or assuming in addition to represent shippers engaged in the same industry on some of the defendant lines, was entitled to bring and maintain this proceeding, affecting rates on milk supplied for a common market, against all the defendants engaged in carrying for that market.⁸⁰ And while an association of shippers has no direct interest in the determination of the question as to whether divisions or allowances from published tariff rates, made by defendants to tap lines owned or controlled by other shippers, constitute departures from the published rates, it has such an indirect interest as entitles it, under the Act, to maintain a proceeding to have such division declared unlawful.⁸¹ When such a petition is filed, it is considered the beginning of the action in all its subsequent stages; consequently the suit of the members of a cattle raisers' association for the recovery of damages should be treated as having been begun by the filing on their behalf of the original petition by the association itself, although they subsequently intervened.⁸² A freight bureau, a concern which admits members upon written contract to perform certain services in return for an annual fee, is an association competent to bring a complaint before the Commission under the Act to Regulate Commerce; the fact that it may not be able to answer in costs in case such should be awarded against it on an appeal from the Commission to the courts does not take away its right to bring complaint under the Act.⁸³ A voluntary improvement association consisting of business men of Council Bluffs, is a competent party complainant to assail as unreasonable and discriminatory passenger fares applicable to the territory from which it

⁸⁰ Milk Producers' Protective Ass'n v. Delaware, L. & W. R. R., 7 I. C. C. Rep. 92.

⁸¹ Central Yellow Pine Ass'n v. Vicksburg, S. & P. R. R., 10 I. C. C. Rep. 193.

⁸² Cattle Raisers' Ass'n v. Chicago, B. & Q. R. R., 10 I. C. C. Rep. 83.

⁸³ Forest City Freight Bureau v. Ann Arbor R., 11 I. C. C. 109.

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draws its membership.⁸⁴ An unincorporated association has a sufficient legal status to be entitled to demand service of an express company, and under section 13 of the Act to file a complaint for the latter's failure to furnish the same.⁸⁵

§ 1089. Board of Trade.

A valid complaint may be made before the Commission, by trade organizations, without disclosing or containing charges of specific acts of discrimination or undue preference, resulting in loss or damage to the individuals of which their membership is composed; but this is not to be understood as implying that it would be competent for the Commission, without a complaint made before it, and without a hearing, to subject common carriers to penalties.⁸⁶ The Act authorizes boards of trade of cities and associations of like character to apply to the Interstate Commerce Commission for relief; and such corporations and members representing such associations may likewise apply to the court for relief from injuries unlawfully inflicted by the Interstate Commerce Commission.⁸⁷ Thus the leading commercial organizations of a city, are competent parties to intervene by petition to the Commerce Court to enjoin the enforcement of an order entered by the Commission requiring carriers from granting to that city reshipping privileges so long as they deny that privilege to other cities named.⁸⁸ A commercial association is a proper party to maintain a petition for relief from the exaction of an illegal or unreasonable charge or for any violation of the law's requirements.⁸⁹ If that is essential, a complaint filed by an association in behalf of certain of

⁸⁴ *West End Improvement Club v. O. & C. B. Ry. Bridge Co.*, 17 I. C. C. 239.

⁸⁵ *California Commercial Ass'n v. Wells, Fargo & Co.*, 14 I. C. C. 422.

⁸⁶ *Texas & P. Ry. v. Interstate Commerce Commission*, 162 U. S.

197, 40 L. ed. 940, 16 Sup. Ct. 666.

⁸⁷ *Peavey & Co. v. Union Pacific R. R.*, 176 Fed. 409.

⁸⁸ *Nashville Grain Exch. v. United States*, 191 Fed. 37.

⁸⁹ *California Commercial Ass'n v. Wells, Fargo & Co.*, 16 I. C. C. 458.

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its members specifically named, and other individuals who are named is held to be a petition by firms and individuals whose names are given.⁹⁰ And a finding thereon that members of the complainant's association are entitled to damages does not include members other than those mentioned in complaint.⁹¹

§ 1090. State Railroad Commission.

It is provided in the Act specifically that the Commission shall in like manner as upon a complaint filed by others investigate any complainant forwarded by a railroad commission or other body with similar powers of any State or Territory; and in the modern legislation by which State bodies of this character are constituted, it is usual to provide that such bodies shall have authority so far as may be deemed advisable to bring matters to the federal Commission for decision which are beyond their own jurisdiction. The repeal of the law creating the railroad commission of Florida does not operate as a withdrawal or dismissal of a complaint brought in its name before the Commission for the real parties in interest.⁹² A complaint may be brought by a state commission on behalf of a citizen.⁹³ But a State railroad commission is not entitled to damages.⁹⁴

§ 1091. Intervening parties.

All persons whether shippers or carriers having an interest in a question pending before the Commission may appear when the case is submitted without being made formal parties.⁹⁵ It may often turn out that the parties

⁹⁰ Michigan Hardwood Mfrs. Ass'n v. Transcontinental Freight Bureau, 27 I. C. C. 32.

⁹¹ Commercial Club of Omaha v. A. & S. R. Ry., 27 I. C. C. 302.

⁹² Railroad Commission of Florida v. Savannah, F. & W. R. R., 3 Int. Com. Rep. 688, 5 I. C. C. 136.

⁹³ R. R. Com'rs of Montana v. N. P. Ry., 26 I. C. C. 482.

⁹⁴ R. R. Com. of Oregon v. S. P. Co., 24 I. C. C. 273.

⁹⁵ Hurlburt v. Lake Shore & M. S. R. R., 2 Int. Com. Rep. 81, 2 I. C. C. 122.

who later intervene are the real parties in interest.⁹⁶ It is, of course, fundamental that no intervention will be allowed which is not germane to the complaint.⁹⁷ And, consequently, interveners will be denied reparation where reparation was not asked in the original complaint.⁹⁸ A cross-complaint might perhaps be the solution of some of these difficulties.⁹⁹ And reparation may be granted where petitions for intervention are allowed.¹ On the other hand, interveners will sometimes be heard to insist that to make the order prayed for would make a discrimination against them.² The Commission has been known to order as a result of intervention that carriers shall submit some plan by which the undue discrimination against intervening communities may be removed.³ Intervenors in many cases will be held entitled to affirmative relief, notwithstanding the objections of defendants.⁴ The Commission has had occasion to remark that the very publicity of its proceedings invites intervention.⁵

§ 1092. Proper parties defendant.

It is fundamental with the Commission that where proper parties not made defendants, damages will be denied.⁶ The authority of the Commission to issue orders in a proceeding is limited to those defendants that are then before it.⁷ Where a through rate is in question, all the carriers participating in the rate are proper parties, and should be joined as defendants.⁸ Each carrier that

⁹⁶ *Mountain Ice Co. v. D., L. & W. R. R.*, 21 I. C. C. 45; modified, 596.

⁹⁷ *Jennison Co. v. Gt. Northern Ry.*, 18 I. C. C. 247.

⁹⁸ *R. R. Com. of Oregon v. S. P. Co.*, 24 I. C. C. 273.

⁹⁹ *Traffic Bureau of Nashville v. L. & N. R. R.*, 28 I. C. C. 533.

¹ *Davis Sewing Machine Co. v. P. C. C. & St. L. Ry.*, 26 I. C. C. 282.

² *Baer Bros. Mercantile Co. v. M. P. Ry.*, 17 I. C. C. 225.

³ *Commercial Club of Duluth v. B. & O. R. R.*, 27 I. C. C. 639.

⁴ *Evens & Howland Fire Brick Co. v. St. L., I. M. & S. Ry.*, 25 I. C. C. 141.

⁵ *Bennett v. M., St. P. & S. S. M. Ry.*, 15 I. C. C. 301.

⁶ *Rock Spring Distilling Co. v. I. C. R.*, 27 I. C. C. 54.

⁷ *Fels & Co. v. P. R. R.*, 25 I. C. C. 154.

⁸ *Warren-Ehret Co. v. Central R. R.*, 8 I. C. C. Rep. 598; *Cattle*

participates in joint rates both to a point discriminated against and to a point preferred is responsible for the discrimination, notwithstanding the fact that its rails do not extend to the latter point.⁹ But a railroad does not discriminate against a locality it does not reach, and in whose carrying trade it does not participate.¹⁰ The carrier over whose line the shipment moved not being a party, damages will be denied.¹¹ But a carrier which participated in the movements although it had not been made a party will, of course, be given permission to participate in the payment of damages.¹² Where a point not on the defendant's line is involved, the complaint unless amended must be dismissed.¹³ And no order can be entered as to rates on coal from a point on the line of a railroad company not made a party defendant.¹⁴ Upon complaint attacking a separately established part of a through charge it is not necessary to make parties any lines where the rate is not attacked.¹⁵

§ 1093. Necessary parties defendant.

All carriers whose appearance is necessary to settle the controversy must of course be present.¹⁶ And no carrier can be affected by the order of the Commission unless he was a party to the proceeding.¹⁷ The reason for securing

Raisers' Ass'n v. Chicago, B. & Q. R. R., 10 I. C. C. Rep. 83; Texas & P. R. R. v. Interstate Commerce Com., 162 U. S. 197, 40 L. ed. 940, 16 Sup. Ct. 666, 5 Int. Com. Rep. 405.

⁹ Mfrs. & Merchants' Ass'n v. A. & A. R. R., 25 I. C. C. 116; Galveston Commercial Ass'n v. A., T. & S. F. Ry., 25 I. C. C. 216.

¹⁰ Ch. of C. of Ashburn v. G. S. & F. Ry., 23 I. C. C. 140.

¹¹ Winterbotham & Sons v. M. P. Ry., 21 I. C. C. 266.

¹² Jones Bros. Co. v. M. & W. R. R., 21 I. C. C. 577; Larson Lumber Co. v. G. N. Ry. Co., 21 I. C. C. 474;

Webster Grocer Co. v. C. & N. W. Ry., 21 I. C. C. 21.

¹³ Thompson Lumber Co. v. Illinois Central R. R., 14 I. C. C. 566.

¹⁴ A. H. Schowalter & Company v. Chicago, R. I. & P. R. Co., 11 I. C. C. 222.

¹⁵ Vulcan Iron Works Co. v. A., T. & S. F. Ry., 22 I. C. C. 477.

¹⁶ Riddle v. Pittsburgh & L. E. R. R., 1 Int. Com. Rep. 773, 1 I. C. C. 490; Michigan Congress Water Co. v. Chicago & G. T. R. R., 2 Int. Com. Rep. 428, 2 I. C. C. 594.

¹⁷ Poughkeepsie Iron Co. v. New York C. & H. R. R. R., 3 Int. Com. Rep. 248, 4 I. C. C. 195.

the appearance of all interested carriers is clear. The reasonableness of rates cannot be fairly determined in a proceeding to which some of the parties responsible for such rates are not parties.¹⁸ When complainants desire to test the justice or legality of the through rates, the necessity of bringing in the parties who make the rates, not for a part of the distance merely but for the whole distance, is obvious; they must be brought in, first, because they have a right to be heard, and second, because an order made and purporting to control their action when they were not parties would be improper on its face, and in a legal sense ineffectual.¹⁹ But where an objection as to the sufficiency of parties defendant was raised for the first time at final argument, it was held that where the necessary parties were omitted in the original petition, and leave was granted to bring them in by amendment and such carriers understood that they had been made parties and filed answers and the case proceeded as though they were parties, the Commission would regard the carriers as properly before it; but if not, then the necessary amendment should be treated as filed *nunc pro tunc*.²⁰ Carriers which participate in a transportation are necessary parties to any proceeding involving rates over their lines.²¹ The result would normally be a dismissal without prejudice on account of nonjoinder of certain carriers.²² In extraordinary cases the Commission of its own motion will bring in additional defendants, if they are unwilling to act upon conclusions reached.²³ But generally speaking the rates

¹⁸ *New Orleans Cotton Exch. v. Cincinnati, N. O. & T. P. R. R.*, 2 Int. Com. Rep. 289, 2 I. C. C. 375; *Michigan Congress Water Co. v. Chicago & G. T. R. R.*, 2 Int. Com. Rep. 428, 2 I. C. C. 594; *Kentucky & I. Bridge Co. v. Louisville & N. R. R.*, 2 Int. Com. Rep. 102, 2 I. C. C. 162.

¹⁹ *Allen v. Louisville N. A. & C. R.*

R., 1 Int. Com. Rep. 621, 1 I. C. C. 199.

²⁰ *Mountain Ice Co. v. D., L. & W. R. R.*, 21 I. C. C. R. 45.

²¹ *Grenada Oil Mill v. I. C. R. R.*, 24 I. C. C. 318.

²² *Barr Chemical Works v. P. & R. Ry.*, 20 I. C. C. R. 77.

²³ *Harbor City Wholesale Co. of San Pedro v. S. P. Co.*, 19 I. C. C. 323.

§§ 1094, 1095] RAILROAD RATE REGULATION

of a carrier not made a party defendant will be held not to be in issue.²⁴

§ 1094. Who are parties in interest.

Any carrier subject to the Act is liable to the person injured for whatever damages accrue by reason of the doing of any act prohibited or declared to be unreasonable by the statute.²⁵ A shipper has standing before Commission though at the time he has no interest in the traffic named, since the Act distinctly provides that no proceeding shall be dismissed by reason of failure of the complainant to show damage to him.²⁶ A caretaker of chickens, negligently permitted by carrier to start on journey free of charge, has been held to be entitled to reparation.²⁷ Generally speaking a party not originally complaining is not entitled to damage.²⁸ If complainant could have got a lower rate elsewhere he is entitled to reparation.²⁹ But where complainants, as shippers of lumber, enjoy in common with all other shippers a lower rate to a more distant point, and no special damage to them nor to the intermediate point is shown, no violation of section 3 is established.³⁰

§ 1095. Defendants must have an interest.

Only persons having some legal interest in the controversy can be joined as parties defendant. For this reason the receiver of a railroad company is not, after his discharge, either a proper or necessary party defendant to an action for a rebate of freight under a contract made by him.³¹ The fact of a receivership for a defendant carrier

²⁴ *Memphis Freight Bureau v. St. L. S. W. Ry.*, 20 I. C. C. R. 33.

²⁵ *National Wool Growers' Ass'n v. O. S. L. R. R.*, 25 I. C. C. 675.

²⁶ *In re Advances in Rates, Western Case*, 20 I. C. C. R. 307.

²⁷ *Ream v. S. P. Co.*, 25 I. C. C. 107.

²⁸ *Byrnes v. Atlantic C. L. R. R.*, 23 I. C. C. 251.

²⁹ *William v. Can.* No. 2, 17 I. C. C. 304.

³⁰ *Appalachia Lumber Co. v. L. & R. R. R.*, 25 I. C. C. 193.

³¹ *Bayles v. Kansas Pacific R. R.*, 13 Colo. 181, 2 Int. Com. Rep. 643.

subsequent to complaint should not interfere with the progress of a proceeding brought merely for the purpose of railway regulation.³² And where a leased road is made the party defendant, the operating road should be added as a party.³³ A group of carriers cannot cast the responsibility of maintaining the burden of establishing the reasonableness of certain advances upon a single carrier, and claim the benefit of whatever the case made by that carrier may establish.³⁴ In a recent proceeding the Commission said that insufficient carriers had been named for it to undertake to settle so broad a question as that of the differential relation of Omaha and Kansas City.³⁵ A complaint failing to name certain carriers is barred as to those carriers.³⁶ There is no judicial estoppel which can be set up later if the parties subsequently involved are different.³⁷

§ 1096. One of several joint parties.

It is not necessary that all carriers should be joined as defendants who would be proper parties to the proceedings. Thus where a complaint is made of rates fixed by an association of carriers, it is not necessary to join all the carriers in the association; ³⁸ the one carrier against which the particular complaint is directed may be the only defendant.³⁹ So a railroad company which participated in through rates is not a necessary, even if it is a proper, party to a proceeding by the Commission against another

³² *Trammell v. Clyde Steamship Co.*, 4 Int. Com. Rep. 120, 5 I. C. C. 324. Or for violations of the Act in general. *Troy Board of Trade v. Alabama Midland Ry.*, 4 Int. Com. Rep. 348, 6 I. C. C. 1.

³³ *Boyer v. Chesapeake, O. & S. W. Ry.*, 7 I. C. C. Rep. 55.

³⁴ *In re Advances on Coal to Lake Ports*, 22 I. C. C. R. 604.

³⁵ *Omaha Grain Exchange v. C., R. I. & P. Ry.*, 28 I. C. C. 680.

³⁶ *Liberty Mills v. Louisville & M. R. R.*, 23 I. C. C. 182.

³⁷ *Receivers & S. Assn. of Cincinnati v. Cincinnati, N. O. & T. P. Ry.*, 18 I. C. C. 440.

³⁸ *Page v. Delaware, L. & W. R. R.*, 6 I. C. C. 548.

³⁹ But see *Minneapolis Chamber of Commerce v. Great Northern Ry.*, 4 I. C. C. 230, 5 I. C. C. 570.

company for disobedience of an order of the Commission in the matter of such rates.⁴⁰ And one or more of several connecting carriers need not be made parties to a proceeding before the Commission against another connecting carrier for unlawful discrimination in rates between places wholly on its own line⁴¹ as compared with the through rate over the connecting lines, even having the same effect.⁴² So where one railroad company owns a controlling interest in a subsidiary company, while service of complaint on the controlling company may not be legal service upon a subsidiary company, it does in fact, for all practical purposes, inform the other company of the proceedings.⁴³ But it is sometimes inconvenient to get all the carriers before the Commission at the same time; and a hearing of a complaint against one of a number of connecting carriers may be the only practical thing.⁴⁴ Then an order may issue against the respondents, and the cause be held for the purpose of bringing such other carriers into it to be proceeded against unless they comply with the order.⁴⁵ Thus while a railroad company, operating its road as part of a through line in connection with other carriers, defendants in a case brought to test the legality of a through charge over such line, is a proper party, it is not a necessary party to the proceeding.⁴⁶ And in proceedings to determine the reasonableness of a through rate as augmented by an alleged unlawful terminal charge, all the carriers participating in the through rate are not necessary parties; the only necessary parties defendant, are the carriers who retain the terminal charge for their own use.⁴⁷ In one proceeding a complaint for

⁴⁰ *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. ed. 940, 16 Sup. Ct. 666, 5 Int. Com. Rep. 405.

⁴¹ *Daniels v. Chicago, R. I. & P. R. R.*, 6 I. C. C. Rep. 458.

⁴² *Independent Relief Ass'n v. Western N. Y. & P. R. R.*, 6 I. C. C. 378.

⁴³ *Mayor and City Council of*

Wichita v. Atchison, T. & S. F. R. R., 9 I. C. C. 534.

⁴⁴ *Hurlburt v. Lake Shore & M. S. R. R.*, 2 Int. Com. Rep. 81, 2 I. C. C. 122.

⁴⁵ *Bates v. Pennsylvania R. R.*, 2 Int. Com. Rep. 715, 3 I. C. C. 435.

⁴⁶ *Warren-Ehret Co. v. Central R. R.*, 8 I. C. C. Rep. 598.

⁴⁷ *Cattle Raisers' Ass'n v. Chicago,*

damages named one road as defendant but it was held that the two connecting lines were necessary parties, such roads being operated as independent properties, though controlled, through stock ownership, by the road named as defendant.⁴⁸ And in a general inquiry the Commission will not undertake to establish differentials where all the carriers interested are not before it.⁴⁹

§ 1097. Liabilities in through carriage.

The liability of the carriers, in case of an unreasonable or discriminatory joint or through rate, is joint and several, and damages may be awarded against one of such roads which participated in the movement, though other roads performing part of the service are not made parties.⁵⁰ It is for this reason fundamentally that all participating carriers must be joined in attack on joint rates.⁵¹ However, reparation will be awarded against an initial carrier which has published a joint through rate in which connecting lines named had not concurred, the combination rate legally applicable being found unreasonable.⁵² Where only a portion of a combination through rate is attacked, it is not necessary to join as defendants all the carriers that are parties to such rate.⁵³ But where the interests of many carriers are involved in the determination the Commission will insist upon having all before it.⁵⁴ Generally speaking, all carriers participating in a through movement should share in refunding if the rate charged is found unreasonable.⁵⁵ But where an overcharge is due to the fault of one carrier misrouting, the carrier to blame should make

B. & Q. R. R., 10 I. C. C. Rep. 83.

⁴⁸ Mountain Ice Co. v. D., L. & W. R. R., 21 I. C. C. 45.

⁴⁹ Boileau v. P. & L. E. R. R., 24 I. C. C. 129.

⁵⁰ Webster Grocery Co. v. C. & N. W. Ry., 21 I. C. C. 20.

⁵¹ Reno Grocery Co. v. So. Pac., 23 I. C. C. 401.

⁵² Texico Transfer Co. v. L. & N. R. R., 20 I. C. C. 17.

⁵³ Globe Milling Co. v. C., M. & St. P. Ry., 24 I. C. C. 594.

⁵⁴ Boileau v. P. & L. E. R. R., 24 I. C. C. 129.

⁵⁵ Platten Produce Co. v. K. L. S. & C. Ry., 18 I. C. C. 249.

the whole refund.⁵⁸ And both the initial and connecting carrier will be required to pay reparation where they were both at fault for misrouting the shipment.⁵⁷ Where a connecting line failed to observe a reconsignment order, it was held to be the one liable in reparation for misrouting.⁵⁸ Whereas if the initial carrier is in fault, it is the one to stand for the recovery in reparation.⁵⁹ Reparation against carriers jointly may usually be divided according to agreement between lines.⁶⁰ But to require or permit any other carrier than the one responsible for misrouting to participate in making reparation would be to permit or require departure from established rates, which is expressly forbidden by law.⁶¹

§ 1098. Who entitled to reparation.

The law contemplates that an award of damages shall be made to the person actually damaged; and so where the complainant does not appear to have suffered any injury, having no legal interest in an overcharge, the Commission can make no award of reparation.⁶² Moreover, it must be shown affirmatively that the complainant is the proper party entitled to damages; the admission of the defendant is not sufficient.⁶³ Generally speaking the person entitled to an award of damages on the ground of the unreasonableness of a rate is the one who has actually paid the rate.⁶⁴ A shipper who had not paid the freight rate nor sustained any loss held not to be entitled to damages, although the rate charged on his shipments was found unduly discriminatory.⁶⁵ It is the view of the Com-

⁵⁸ *Flaccus Glass Co. v. C., C. & St. Louis Ry.*, 14 I. C. C. 333.

⁵⁷ *Beekman Lumber Co. v. O. Ry. & N. Co.*, 19 I. C. C. 343.

⁵⁶ *Noble v. J. L. C. & E. R. R.*, 20 I. C. C. 520.

⁵⁵ *Noble v. St. L. & S. F. R. R.*, 16 I. C. C. 186.

⁶⁰ *Davenport Pearl Button Co. v. Chicago, B. & St. L. R. R.*, 17 I. C. C. 193.

⁶¹ *Hennepin Paper Co. v. N. P. R. R.*, 12 I. C. C. 535.

⁶² *Lamb, McGregor & Co. v. C. & N. W. Ry.*, 22 I. C. C. 346.

⁶³ *Baker Mfg. Co. v. C. & M. W. Ry.*, 21 I. C. C. 605.

⁶⁴ *National Wool Growers' Ass'n v. O. S. L. R. R.*, 25 I. C. C. 675.

⁶⁵ *Evens & Howard Fire Brick Co. v. St. L., I. M. & S. Ry.*, 25 I. C. C. 141.

mission that an award of reparation is due only from a carrier to a shipper, and not to one carrier, as a carrier, from another.⁶⁶ But section 20 provides that the initial carrier has a right of action against a connecting carrier for any loss or damage to property occurring on the latter's line.⁶⁷ If the complaining party is the one who sustained the burden of the excess, he is the one entitled to reparation.⁶⁸ Thus reparation is due the owner of property paying excessive charge or on whose behalf it was paid.⁶⁹

§ 1099. As between consignor and consignee.

Where freight charges are paid by the consignee to whom the goods had been sold, it is plain that the consignor is not the party who is entitled to damages.⁷⁰ And a purchaser of goods in transit, the vendor having paid the freight charges up to point of purchase, is the one entitled to damages for misrouting.⁷¹ A consignee, who paid the freight charges on a shipment place of destination, but deducted that amount from the invoice price of goods, returning the expense bills to the consignor, is not entitled to damages.⁷² And, likewise, the consignor is entitled to damages for an unreasonable rate, where a consignee commission merchant actually paid the freight charges, but billed them back on the consignor, who ultimately paid them.⁷³ Although the complainant is a broker, nevertheless if the shipments were purchased outright by him, he is entitled to an award of reparation.⁷⁴ But unless the goods are sold, the vendee to pay the

⁶⁶ *Mfrs. Ry. Co. v. St. L., I. M. & S. Ry.*, 28 I. C. C. 93.

⁶⁷ *Coal Rates on the Stony Fork Branch*, 26 I. C. C. 168.

⁶⁸ *Lindsay Bros. v. C. R. & I. R. R.*, 15 I. C. C. 192.

⁶⁹ *Gamble-Robinson Commission Co. v. St. L. & S. F. R. R.*, 19 I. C. C. 114; *Sunnyside Coal Mining Co. v. D. & R. G. R. R.*, 19 I. C. C. 20.

⁷⁰ *Fond du Lac Church Furnishing Co. v. C., M. & St. P. Ry.*, 21 I. C. C. 481.

⁷¹ *Gibson Fruit Co. v. C. & N. W. Ry.*, 21 I. C. C. 644.

⁷² *Baker Mfg. Co. v. C. & N. W. Ry.*, 21 I. C. C. 605.

⁷³ *Youngblood v. T. & P. Ry.*, 21 I. C. C. 569.

⁷⁴ *Central Commercial Co. v. A., T. & S. F. Ry.*, 26 I. C. C. 373.

freight, the consignor is the substantial party in interest, and entitled to the damages for improper exactions.⁷⁵ Where the complainant is a commission merchant, neither consignor nor consignee, it will be difficult to show that he is the real party in interest.⁷⁶ But commission merchants who were under obligation to pay freight charges are upon the face of the transaction the only proper parties who can maintain suit for an overcharge or an excessive rate.⁷⁷ *Per contra* the consignor, who sold goods at a delivered price under contract that consignor should pay the freight, is entitled to the damages, though the consignee actually paid freight charges.⁷⁸ And a consignee who has paid charges based on an unreasonable rate is not entitled to reparation where such charges have been deducted from the shippers' invoice.⁷⁹

Topic C. Order of Procedure

§ 1100. Default for failure to proceed.

The petition will be dismissed if the complainant fails to appear at the hearing.⁸⁰ The same result naturally follows if he admits the legality of the defendant's acts.⁸¹ And a complainant can expect nothing but dismissal if he totally fails to produce any evidence to prove the issue.⁸² The Commission has had occasion to say sharply that it is not enough to file a complaint, the party complaining must pursue it.⁸³ And generally speaking if the complainant fails to appear, the complaint will be dismissed.⁸⁴

⁷⁵ Commercial Club of Omaha v. A. & S. Ry., 27 I. C. C. 302.

⁷⁶ Jones v. K. C. S. Ry., 17 I. C. C. 468.

⁷⁷ Crutchfield & Woolfolk v. S. P. Co., 24 I. C. C. 679.

⁷⁸ Mountain Ice Co. v. D., L. & W. R. R., 21 I. C. C. 596.

⁷⁹ Deming Lumber Co. v. S. P. Co., 24 I. C. C. 598.

⁸⁰ Jackson v. St. Louis, A. & T. Ry., 1 I. C. R. 599.

⁸¹ Re Export Trade of Boston, 1 Int. Com. Rep. 25, I. C. C. 24.

⁸² Holbrook v. St. Paul, M. & M. R. R., 1 Int. Com. Rep. 323, 1 I. C. C. 102; Leonard v. Union Pacific Ry., 1 Int. Com. Rep. 627; Rice v. Louisville & N. R. R., 1 Int. Com. Rep. 722.

⁸³ Advance Thresher Co. v. Orange & N. W. R. R., 15 I. C. C. 599.

⁸⁴ Guthril v. Chicago, R. I. & P. Ry., 16 I. C. C. 425.

PROCEDURE BEFORE THE COMMISSION [§ 1101

The Commission without having urged the plaintiffs to go forward may dismiss the complaint for lack of diligent prosecution.⁸⁵ But where it appears that the failure to appear was in not getting notice in time, the case may be continued.⁸⁶ According to the practice usually, however, appearance on day of hearing is insisted on.⁸⁷ Complaint was dismissed in one case where the position as taken by complainant obviously constituted an abandonment of his complaint.⁸⁸ Clearly where there is no appearance in a reparation proceeding, the case will be dismissed.⁸⁹ But also where there is a failure to appear and show unreasonableness, the complaint will usually be summarily disposed of in the same way.⁹⁰

§ 1101. Dismissal of the complaint.

In formal proceedings before the Commission complaints must be prosecuted with reasonable diligence, and when a case has been formally assigned for hearing on a day certain, the parties must appear and present such evidence as they may wish to offer in support of their contentions, or, in advance of the date set, request postponement on stated grounds, showing good and sufficient cause for delay.⁹¹ It would be the usual practice to order dismissal on motion of both the complainant's and defendant's attorneys.⁹² But a complaint may not be dismissed without the consent of the Commission, as the public character of these proceedings prevents them from being dismissed simply on stipulation of the parties.⁹³ A dismissal will be ordered where no complaint is made against reasonableness

⁸⁵ *Ocheltree Grain Co. v. Texas & P. R. R.*, 18 I. C. C. 412.

⁸⁶ *Patten v. Wisconsin Central Ry.*, 14 I. C. C. 189.

⁸⁷ *Producers' Pipe Line Co. v. St. L., I. M. & S. Ry. Co.*, 12 I. C. C. 186.

⁸⁸ *Ringfisher Mill & Elevator Co. v. Chicago, R. I. & P. R.*, 11 I. C. C. 220.

⁸⁹ *Wakita Coal & S. Co. v. Atchison & St. F. Ry.*, 15 I. C. C. 533.

⁹⁰ *Isbell-Brown Co. v. M. C. R. R.*, 15 I. C. C. 616.

⁹¹ *Producers' Pipe Line Co. v. St. L., I. M. & S. Ry.*, 12 I. C. C. 186.

⁹² *Wilhoit v. Missouri P. R. Co.*, 12 I. C. C. 137.

⁹³ *In re Advance in Rates, Western Case*, 20 I. C. C. 307.

of the specified through rate.⁴⁴ Where facts, circumstances and conditions bearing upon reasonableness of rates in issue are not sufficiently developed to afford a proper basis for satisfactory determination, the case will be dismissed.⁴⁵ Dismissal without prejudice may be ordered where the record shows no clear basis for an order changing rates.⁴⁶ Likewise the case would properly stand for dismissal upon a readjustment of the tariffs being made to the satisfaction of the complainants.⁴⁷ Dismissal as to a defendant shown not to be involved in the issues is very common.⁴⁸ If complainant by formal pleading admits reasonableness, the complaint will usually be dismissed.⁴⁹ But it is considered improper practice to decline at an earlier stage informal adjustment, and then admit complaint in answer in formal proceedings subsequently.¹

§ 1102. Stay of proceedings.

The Commission may in a proper case stay the proceedings and hold the case open until a future time. Where a similar case had been heard by the Commission and an order made and a petition to enforce the order was pending in the courts, the present case was stayed until final determination of the petition in the courts.² And so where it seemed best the Commission having indicated its view of the question, recommended the carriers concerned to amend their tariffs in accordance with the opinion so expressed, and meanwhile held the case open for future application of the parties.³ It may often seem to the

⁴⁴ *Morgan v. M., K. & T. R. Co.*, 12 I. C. C. 525.

⁴⁵ *Shiel & Co. v. Illinois C. R. Co.*, 12 I. C. C. 210.

⁴⁶ *Dallas Freight Bureau v. M., K. & T. R. Co.*, 12 I. C. C. 427.

⁴⁷ *McRae Grocery Co. v. Southern R. Co.*, 12 I. C. C. 83.

⁴⁸ *Dallas Freight Bureau v. G., C. & S. F. R.*, 12 I. C. C. 223.

⁴⁹ *Zellerbach Paper Co. v. Atchison, T. & S. F. Ry.*, 16 I. C. C. 128.

¹ *Davenport Pearl Button Co. v. Chicago, B. & Q. R. R.*, 17 I. C. C. 193.

² *Southern Paint & G. Co. v. Lake Erie & W. R. R.*, 6 I. C. C. Rep. 284.

³ *Paine Bros. & Co. v. Lehigh Valley R. R.*, 7 I. C. C. Rep. 218; and see *Rea v. Mobile & O. R. R.*, 7 I. C. C. Rep. 43.

Commission the best course of proceeding to delay further action for an adjustment by the parties.⁴ And if the question of jurisdiction is raised it must always be considered before the merits of the controversy are determined.⁵ But an order may be entered where no objection is made by the defendants of defect in parties.⁶ Where a carrier at the hearing agrees to conform to the desires of the Commission, the usual practice is that no order will be made at the time; but the case will be continued to give the carrier an opportunity to remove the cause of complaint.⁷ Thus in the express cases no order was entered pending opportunity for express companies to file tariffs in accordance with suggestions made.⁸ But no case under any such circumstances can be said to have been discontinued until final disposition.⁹

§ 1103. Satisfaction of complaint.

Where a complaint has been satisfied, an order requiring a continuance of present nondiscriminatory practices will not be considered necessary.¹⁰ A complaint alleging undue discrimination against a city in that it was deprived of the benefit of joint rates cannot be sustained where the joint rates to the cities alleged to have been unduly preferred have been canceled.¹¹ The Commission will usually permit a case to be settled through the readjustment of tariffs, showing considerable reductions in the rates complained of to the satisfaction of complaints.¹² Mere agreement of parties with respect to a rate, or mere subse-

⁴ *Weleetata Light & Water Co. v. Ft. S. & W. R. R. Co.*, 12 I. C. C. 503.

⁵ *Mattison v. Pennsylvania Co.*, 23 I. C. C. 233.

⁶ *Cattle Raisers' Ass'n of Texas v. G. H. & S. A. Ry.*, 12 I. C. C. 20.

⁷ *Hot Springs v. Western N. C. R. R.*, 1 Int. Com. Rep. 316; *Holbrook v. St. Paul, M. & M. Ry.*, 1 Int. Com. Rep. 323, 1 I. C. C. 102; *Re Alleged*

Unlawful Transportation Charges, 6 I. C. C. Rep. 624.

⁸ *Douglas Shoe Co. v. Adams Express Co.*, 19 I. C. C. 539.

⁹ *Spokane v. N. P.*, 23 I. C. C. 454.

¹⁰ *Humboldt S. S. Co. v. White Pass & Yukon Route*, 25 I. C. C. 136.

¹¹ *Baker Commercial Club v. O. W. R. R. & No. Co.*, 25 I. C. C. 281.

¹² *McRae Grocery Co. et al. v. Southern Ry.*, 12 I. C. C. 83.

quent reduction of a rate is not a sufficient ground for a finding of unreasonableness or undue prejudice; for damages will not be awarded merely upon a showing that the carrier is willing to honor a claim.¹³ Where a carrier is willing to award reparation on the basis of an out-of-line rate, which rate defendant is unwilling to maintain in the future, damages will be denied.¹⁴ And generally speaking when an adjustment is satisfactorily made to all parties in interest the case usually will be dismissed by the Commission.¹⁵ And especially where an agreement is reached by the parties as to future rates, it will not be difficult to get the complaint dismissed.¹⁶ The complaint having been satisfied by the restoration of the rate previously in force and the withdrawal of the rate complained of by tariff duly filed, will usually be on application of complainants, dismissed.¹⁷

§ 1104. Conditions of granting reparation.

The awarding of damages does not necessarily follow the reduction of a rate.¹⁸ Nor is fixing a rate for the future a prerequisite to the award of reparation.¹⁹ No reparation will be granted, though the Commission finds that the rates are unreasonable, unless it be found that the rates were unreasonable at the time they were paid.²⁰ Nor where the injury for which reparation is asked occurred through the fault of the complainant.²¹ And where the claim for reparation has already been settled between the parties, the Commission will not generally take further action.²² Where a complaint as filed did not ask repara-

¹³ *Esson Granite Co. v. S. Ry.*, 26 I. C. C. 449.

¹⁴ *Chaffin Coal Co. v. C., M. & St. P. Ry.*, 24 I. C. C. 321.

¹⁵ *Watson Co. v. Lake Shore & M. S. Ry.*, 16 I. C. C. 124.

¹⁶ *Montgomery Freight Bureau v. Western Ry. of Ala.*, 15 I. C. C. 199.

¹⁷ *T. H. Bunch Co. v. Chicago, R. I. & P. R.*, 11 I. C. C. 377.

¹⁸ *Minneapolis Steel & Machinery Co. v. C., M. & St. P. Ry.*, 26 I. C. C. 193.

¹⁹ *Steinfeld & Co. v. I. C. R. R.*, 20 I. C. C. 12.

²⁰ *Grain Shippers' Ass'n v. Illinois Cent. R. R.*, 8 I. C. C. Rep. 158.

²¹ *Gardner v. Southern R. R.*, 10 I. C. Rep. 342.

²² *Stahl v. Oregon Ry. & Nav. Co.*,

tion, and there being no evidence touching specific shipments, that feature of the case will not be considered, although a motion to that effect is noted in the record of the hearing.²³ Reparation may be awarded in supplemental petition, although there is a general rule against awarding reparation piecemeal.²⁴ It is to be emphasized that reparation on shipments previously made will not be ordered as a matter of course, even where the Commission finds that the ends of justice require the reduction of rate complained of for the future.²⁵

§ 1105. Scrutiny of reparation agreements.

So great is the fear that adjustments through the process of submitting to reparation may be used as a cover for discrimination that generally speaking a willingness to pay by the carrier is no ground for awarding reparation to the shipper.²⁶ The Commission cannot base its findings or apply to the past a privilege merely because the carrier is willing.²⁷ The rule is, therefore, that no reparation will be awarded in the absence of specific proof as to each car involved.²⁸ It is fundamental with the Commission that it will not award reparation in absence of proof sufficient to carry conviction of the wrong.²⁹ Certainly if it appears that the award to which the carrier assents is to carry out a deal to give a rate lower than schedule, the Commission will not confirm it.³⁰ For to sanction such a prior understanding would plainly be to create a cover for discrimination.³¹ And, therefore, as an evidence of good faith, if the

¹ Int. Com. Rep. 314; *Sayles v. New York, N. H. & H. R. R.*, 9 I. C. C. Rep. 492.

²³ *Atchison v. St. L., I. M. & S. Ry.*, 22 I. C. C. 131.

²⁴ *Partridge Co. v. B. & M. R. R.*, 19 I. C. C. 551.

²⁵ *Farmers' Warehouse Co. v. L. & N. R. R.*, 12 I. C. C. 457.

²⁶ *Pabst Brewing Co. v. Chicago, M. & St. P.*, 17 I. C. C. 359.

²⁷ *Cady Lumber Co. v. M. P. Ry.*, 19 I. C. C. 12.

²⁸ *Murphy Bros. v. New York C. & H. R. R.*, 17 I. C. C. 457.

²⁹ *Taylor v. Missouri Pacific Ry.*, 15 I. C. C. 165.

³⁰ *Crowell & S. Lumber Co. v. Texas & P. R. R.*, 17 I. C. C. 333.

³¹ *Amour Car Line v. Southern Pacific*, 17 I. C. C. 461.

carrier admits unreasonableness, it must file new rates as prerequisite to reparation.³² And if these are only to be in effect temporarily to work through the agreed reparation, the whole scheme will be investigated further.³³ However, if the Commission is satisfied as to the bona fides of the agreement, the stipulation of parties will be approved.³⁴

§ 1106. Parties given opportunity to be heard.

Proceedings on complaint of a party take the form of judicial proceedings. Thus a reasonable opportunity will be given for the parties to be heard.³⁵ So where a railroad submits a shipper's claim for carload rating on a mixed carload to the Commission, it will be treated as a complaint and answer, and the cause will proceed judicially.³⁶ If parties have had their day in court, they cannot resist reparation.³⁷ But if no other manufacturers have joined in this complaint, or made independent complaint, it is possible that they may be materially affected by a disturbance of adjustment that has continued for so many years.³⁸ And generally speaking if insufficient carriers are named for the Commission to undertake to settle broad questions the case will not be prosecuted further, for the time being at all events.³⁹ The Supreme Court is now plainly insistent that all parties before the Commission must be fully apprised of the evidence submitted or to be considered and must be given opportunity to cross-examine witnesses and to inspect documents and to offer evidence in explanation and rebuttal.³⁹ In no other way consistently with

³² *Vemis v. St. Louis, I. M. & S. Ry.*, 15 I. C. C. 136.

³³ *Holcomb, Hayes & Co. v. Illinois C. R. R.*, 13 I. C. C. 16.

³⁴ *Joice & Co. v. Illinois Central Ry.*, 15 I. C. C. 239.

³⁵ *Business Men's Ass'n v. Chicago & N. W. Ry.*, 2 Int. Com. Rep. 48, 2 I. C. C. 52.

³⁶ *Roth v. Texas & P. Ry.*, 9 I. C. C. Rep. 602.

³⁷ *Kindelon & Co. v. Southern Pacific*, 17 I. C. C. 251.

³⁸ *National Syrup Co. v. C. & N. W. Ry.*, 28 I. C. C. 673.

³⁹ *Omaha Grain Exchange v. C., R. I. & P. Ry.*, 28 I. C. C. 680.

³⁹ *United States v. B. & O. S. W. Ry.*, 226 U. S. 14, 27 Sup. Ct. 648.

what we consider the course of the administration of justice can a party maintain its rights or make out its defense.^{39a}

§ 1107. Hearing duly notified indispensable.

As has been seen in a former chapter, the Commission is not invested with authority to find any rate unreasonable except after full hearing.⁴⁰ The policy underlying the section giving the Commission power to revise rates is that rates established by carrier cannot be condemned unless upon full hearing they shall be found unreasonable.⁴¹ The Commission, therefore, has jurisdiction to deal only with those carriers which are parties to the proceedings.⁴² And no order entered against a carrier that has not been cited to appear at the hearing.⁴³ The Commission will not determine an important question of differentials in a general adjustment of rates in a case where only one carrier, operating over but a part of the through route to Atlantic ports, is defendant.⁴⁴ Discussions of substitution of tonnage at transit points, and of transit rules, reports thereunder, and policing thereof would be pertinent only in a general investigation.⁴⁵ And reasonableness of extra charges will not be considered where petition contains no allegations in respect thereto.⁴⁶ It follows that the Commission cannot determine what rates are reasonable for the transportation of other commodities or rates on the same commodities from other points, upon a complaint dealing with specific kinds of commodities from a particular locality.⁴⁷

^{39a} *Interstate Commerce Commission v. L. & N. Ry.*, 227 U. S. 88, 33 Sup. Ct. 185.

⁴⁰ *Douglas & Co. v. C., R. I. & P. Ry.*, 21 I. C. C. 541.

⁴¹ *Anadarko Cotton Oil Co. v. A., T. & S. F. Ry.*, 20 I. C. C. 43.

⁴² *Griffing v. C. & N. W. Ry.*, 25 I. C. C. 134.

⁴³ *Baker Commercial Club v. O. W. R. R. & N. Co.*, 25 I. C. C. 281.

⁴⁴ *Board of Trade of Chicago v. I. C. C.*, 26 I. C. C. 545.

⁴⁵ *In re Advances on Logs*, 24 I. C. C. 683.

⁴⁶ *Lesinsky v. A., T. & S. F. Ry.*, 24 I. C. C. 620.

⁴⁷ *Milburn Wagon Co. v. L. S. & M. S. Ry.*, 22 I. C. C. 93.

§ 1108. Requisites as to hearings.

As the Act reads, it is, therefore, a limitation upon its jurisdiction that the Commission cannot prescribe a rate without investigation and hearing.⁴⁸ And the Commission has often pointed out that no order can be made until after a full hearing as provided in section 15.⁴⁹ The reasonableness of rates cannot be considered except upon a proceeding which properly puts them in issue.⁵⁰ And damages are awarded upon the facts established upon the hearing, and not upon the allegations of the complaint.⁵¹ The Commission can make findings only upon such issues as are clearly raised by the complaint, while weighing all pertinent facts and testimony adduced.⁵² Where the Commission has suspended rates in one territory upon hearing, it cannot pass upon the reasonableness of rates in other territory, none of the carriers in the latter territory having been made parties.⁵³ If there are neither sufficient parties nor sufficient information before the Commission to enable it to pass upon the question of issues involved it will not pass upon the through rates which would be directly affected.⁵⁴ Where a complaint failed to point out any discrimination and did not ask that any discrimination be corrected, the Commission will decline to consider the question of discrimination, although the petition generally alleged a violation of the Act.⁵⁵ The determination of broad questions should be in some comprehensive proceeding to which the parties in interest can be made parties.⁵⁶ A case involving local rates will, therefore, usually be ordered to be heard before at a cen-

⁴⁸ *In re Express Rates*, 28 I. C. C. 132.

⁴⁹ *Augusta & Savannah Steamboat Co. v. O. S. S. Co. of Savannah*, 26 I. C. C. 380.

⁵⁰ *Douglas & Co. v. C., R. I. & P. Ry.*, 21 I. C. C. R. 541.

⁵¹ *Beekman Lumber Co. v. M. C. R. R.*, 21 I. C. C. R. 276.

⁵² *Sinclair & Co. v. C., M. & St. P. Ry.*, 21 I. C. C. 490.

⁵³ *In re Advances in Rates on Locomotives and Tenders*, 21 I. C. C. 103.

⁵⁴ *In re Advances of Rates on Livestock*, 21 I. C. C. 119.

⁵⁵ *United States Leather Co. v. S. Ry.*, 21 I. C. C. 323.

⁵⁶ *In re Advances in Class Rates*, 27 I. C. C. 268.

tral point in the territory immediately affected by the rates.⁵⁷

§ 1109. Course of the proceedings.

It is, of course, elemental that the Commission must observe the requirements of the Act for notice and hearing; and keep to the provisions of the statute as to process and procedure.⁵⁸ If the petition is not specific, though plainly sufficient to constitute the basis for an award of damages, the defendants are entitled, before the hearing, to a specification showing in detail the amounts for which recovery is sought.⁵⁹ Upon a complaint alleging undue preference, it was held that the question of the reasonableness *per se* of rates is automatically imported into a case through the suspension of the tariffs.⁶⁰ As each case must be determined on its own merits, the Commission cannot, on the record in this case, determine what rule or practice should obtain at milling-in-transit points generally throughout the country.⁶¹ Notice of complaint need only be given to those directly concerned, not to those remotely interested.⁶² The Commission has tried to simplify its practice and procedure, without permitting technical matters to interfere with substantial results.⁶³ Though it appeared at the hearing that the joint through rate was in excess of the sum of the locals, the Commission held that the amount of the through rate was not in issue upon a complaint seeking damages on the basis of an unpublished division of the through rate.⁶⁴ Upon complaint of an overcharge, the Commission, on its own motion, may

⁵⁷ Delaware State Grange v. New York, P. & N. R. R., 2 Int. Com. Rep. 187, 2 I. C. C. 309.

⁵⁸ Stone & Meyers Co. v. Louisville & W., 14 I. C. C. 199.

⁵⁹ Cattle Raisers' Ass'n v. Chicago, B. & Q. R. R., 10 I. C. C. Rep. 83.

⁶⁰ Douglas & Co. v. C., R. I. & P. Ry., 21 I. C. C. 97.

⁶¹ Brook Rauch Mill & Elevator Co.

v. St. L., I. M. & S. Ry., 21 I. C. C. 651.

⁶² Louisville & N. R. R. v. Interstate Commerce Commission, 184 Fed. 118.

⁶³ Cincinnati & Columbus Traction Co. v. B. & O. S. W. R. R., 20 I. C. C. 486.

⁶⁴ Beekman Lumber Co. v. St. L. & S. F. R. R., 21 I. C. C. 270.

set the case down for further hearing, and found the rate unreasonable, though there was no overcharge.⁶⁵ Oral argument is allowed in cases affecting rates and practices if requested when testimony closed.⁶⁶ And if briefs are submitted it is to be noted that the parties cannot themselves extend the time for filing briefs by stipulation between themselves, as cases before the Commission are not analogous to private litigation.⁶⁷

§ 1110. Limitations of actions.

The statute of limitations contained in the Act bars a reparation claim on shipments which have been delivered to the complainant more than two years prior to the filing of the complaint.⁶⁸ And conversely the right to reparation being secured to shippers for two years by the Act, the Commission cannot qualify that right by barring a complainant for laches within that time, or by demanding that the proof shall be conclusive.⁶⁹ The Act provides that no order for reparation shall be made unless the claim is filed with the Commission within two years from the time the cause accrues.⁷⁰ Without regard to the date of payment of charges, the cause of action of a shipper accrues when a shipment is delivered.⁷¹ To be exact, claims presented

⁶⁵ *Oster Bros. v. M. L. & T. R. R. & S. S. Co.*, 21 I. C. C. 511.

⁶⁶ *Ullman v. Adams Express Co.*, 14 I. C. C. 585.

⁶⁷ *Ullman v. Adams Express Co.*, 14 I. C. C. 585.

Quare, whether the two year limitation on reparation suits applies to enforcement suits. *Lynde v. D. L. & W. Ry.*, 170 Fed. 847.

⁶⁸ *St. Louis Blast Furnace Co. v. V. Ry.*, 24 I. C. C. 360; see also *Anaconda Copper Mining Co. v. C. & E. R. R.*, 19 I. C. C. 592.

⁶⁹ *Thompson Lumber Co. v. Interstate Commerce Commission*, 193 Fed. 682.

⁷⁰ *National Wool Growers' Ass'n v. O. S. L. R. R.*, 25 I. C. C. 675.

⁷¹ *Arkansas Fertilizer Co. v. St. L., I. M. & S. Ry.*, 25 I. C. C. 266.

Claims for damages held to be barred because two years had elapsed since the delivery of the goods to the consignee, although within two years of the filing of the complaint some of the charges were paid. *Standard Oil Co. v. C., T. T. R. R. Co.*, 21 I. C. C. 460. Each item is subject to being barred upon the running of the two years against it. *National Refining Co. v. A., T. & S. F. Ry.*, 8 I. C. C. 389.

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to the Commission more than two years subsequent to the delivery of the shipment to the consignee are barred by the statute of limitations by the terms of the Act.⁷² The filing of each claim is, in essence, an independent proceeding on the part of that complainant, and the statute of limitations must run from the date of the filing in each individual case.⁷³ Despite promises by carriers not to take advantage of the period of limitation in the Act, the Commission will not take action after that period has passed.⁷⁴ When reparation is for the first time asked by amendment, the time of the amendment determines the limitation.⁷⁵ The filing of an informal complaint by a consignee stops the running of the statute for the benefit of the consignor, though the latter did not file his formal complaint within two years from the time the cause of action accrued.⁷⁶

§ 1111. Dismissal when order unnecessary.

When upon investigation of a complaint the carrier finds that the grievance once existed, but has been removed by the carrier, the petition will be dismissed.⁷⁷ This is true

⁷² *Coffers Box Lumber Co. v. C. & N. W. Ry.*, 25 I. C. C. 249.

⁷³ *In re Advances on Livestock*, 28 I. C. C. 332; see also *Beekman Lumber Co. v. St. L. & S. F. R. R.*, 21 I. C. C. 270.

⁷⁴ *Werner Saw Mill Co. v. Illinois Central R. R.*, 17 I. C. C. 388; see also *Meeker v. Lehigh V. R. R.*, 23 I. C. C. 480.

⁷⁵ *East St. Louis Walnut Co. v. St. Louis S. W. Ry.*, 17 I. C. C. 582. But see also *Montana Ice. Co. v. D., L. & W. Ry.*, 21 I. C. C. 45.

⁷⁶ *Youngblood v. T. & P. Ry.*, 21 I. C. C. 569; see also *Gamble-Robinson Commission Co. v. St. L. & S. F. Ry.*, 119 I. C. C. 114.

The rule followed by the Commission that ordinarily reparation

will not be awarded unless complaint is filed or rate complained of is reduced within six months after traffic moves is confined to informal matters. *Riverside Mills v. G. R. R.*, 20 I. C. C. 423. But the running of the statute is not barred by presentation of an informal complaint, where complainant failed to present formal complaint until five years later. *Dillon Coal & Transfer Co. v. O. S. L. R. R. Co.*, 28 I. C. C. 91.

⁷⁷ *Fulton v. Chicago, S. P., M. & D. R. R.*, 1 Int. Com. Rep. 375, 1 I. C. C. 104; *Lincoln Board of Trade v. Union P. R. R.*, 2 Int. Com. Rep. 101, 2 I. C. C. 229; *Harris v. Duval*, 2 Int. Com. Rep. 514; *Pennsylvania Co. v. Louisville, N. A. & C. R. R.*, 2 Int. Com. Rep.

though the grievance was removed after the beginning of the litigation; and this rule applies even after the hearing has been had.⁷⁸ Similarly a complaint will be dismissed as to one carrier out of several defendants where it appears that such carrier did not participate in the rates in question.⁷⁹ Under section 13 of the Act a carrier has a definite *locus penitentiae* in order to determine whether it will yield to the demand made or contest it; and the carrier has the right to have the complaint so stated as to afford it the necessary information to enable it to determine whether to request the authority of the Commission to satisfy the demand or to make a formal answer.⁸⁰

Topic D. Evidence and Burden of Proof

§ 1112. Rules of evidence.

Generally speaking the ordinary rules of evidence are enforced in proceedings before the Commission; thus the rule as to parol evidence appears to be enforced. So terms of art, or terms peculiar to any occupation or business, used in a classification sheet to designate the product of a particular employment, are supposed to be understood in that employment; and it is not competent for railroad experts, when the meaning of the classification is questioned, to testify in what sense they are understood in classification circles.⁸¹ On the same general principle, unauthorized declarations of a depot agent, implying that a tank car which has returned from one long journey is in

603; *Rawson v. Newport News & M. V. R. R.*, 2 Int. Com. Rep. 626; *Re Tariffs & Classifications of Pa. R. R.*, 7 I. C. C. Rep. 177; *Paine v. Lehigh Valley R. R.*, 7 I. C. C. Rep. 218; *Montell v. Baltimore & O. R. R.*, 7 I. C. C. Rep. 412; *Wichita v. Atchison, T. & S. F. R. R.*, 9 I. C. C. Rep. 507.

⁷⁸ *Michigan Box Co. v. Flint & P. M. R. R.*, 6 I. C. C. Rep. 335; see also *Manufacturers & Jobbers' Union*

v. Minneapolis & S. L. Ry., 1 Int. Com. Rep. 630; *Boyer v. Chesapeake, O. & S. W. Ry.*, 7 I. C. C. Rep. 55.

⁷⁹ *Chicago Livestock Exchange v. Chicago G. W. Ry.*, 10 I. C. C. Rep. 428.

⁸⁰ *Missouri T. K. Shippers' Ass'n v. A., T. & S. F. R. R.*, 11 I. C. C. 411.

⁸¹ *Hurlburt v. Lake Shore & M. S. R. R.*, 2 Int. Com. Rep. 81, 2 I. C. C. 122.

a safe condition to be loaded and started on another long run, are not binding upon the railway company.⁸² The usual procedure is for witnesses who are officers and agents of the carriers to come prepared with sworn statements taken from the books as to what they actually show and examination and cross-examination verifies these statements and shows what supplements, if any, they need.⁸³ There can be no findings upon evidence so vague and unsatisfactory that no definite finding could safely be predicated thereon.⁸⁴ But the Commission is more free than a court would be to consider "best knowledge and belief" evidence.⁸⁵

§ 1113. *Res adjudicata*.

While Commission is not bound by the doctrine of *stare decisis* or *res adjudicata*, a decision recently announced will be given full weight in the determination of the reasonableness per se of rates later in controversy.⁸⁶ *Stare decisis* and *res adjudicata* do not govern the Commission, but the policy behind all these principles is one which cannot be ignored.⁸⁷ The Commission as a practical matter will be concluded by a decision in prior case, unless it was founded on error or on conditions that have since undergone change.⁸⁸ Oftentimes a plea of estoppel will be held not to be good, but usually it will be found in such cases that the circumstances are dissimilar.⁸⁹ But where the circumstances are appropriate the contention will generally be successful that the issues involved in a particular proceeding were decided in a previous case, and are, there-

⁸² Michigan Congress Water Co. v. Chicago & G. T. R. R., 2 Int. Com. Rep. 428, 2 I. C. C. 594.

⁸³ Rice v. Cincinnati, W. & B. R. R., 2 Int. Com. Rep. 584, 595, 3 I. C. C. 186.

⁸⁴ Iola Portland Cement Co. v. M., K. & T. Ry., 20 I. C. C. 91.

⁸⁵ Clinton Bridge & Iron Works

v. C., B. & Q. R. R., 20 I. C. C. 416.

⁸⁶ Commercial Club of Superior v. G. N. Ry., 24 I. C. C. 96.

⁸⁷ Schmidt & Sons v. M. C. R. R., 23 I. C. C. 684.

⁸⁸ Flour City S. S. Co. v. L. V. R. R., 24 I. C. C. 179.

⁸⁹ National Hay Ass'n v. M. C. R. R., 19 I. C. C. 34.

fore, *res adjudicata*.⁹⁰ It should be noted that contracts and tariffs filed with the Commission under the Act are likely to be considered, although not specifically introduced in evidence at the hearing.⁹¹ And the findings of the Commission in a former case are conclusive without requiring further evidence.⁹² If put in evidence the Commission will always give due and respectful consideration to decision of State Commission.⁹³

§ 1114. Insufficient grounds for findings.

The Commission is clear that the reasonableness of railroad rates cannot be proven by categorical answers by a witness stating simply his opinion as to whether the rates now charged are unreasonable.⁹⁴ Thus a general statement that cost of conducting terminals has increased and more revenue is needed is insufficient.⁹⁵ It is not enough to have the president and traffic manager testify that, based upon their best judgment and experience, they considered present rates too low and that proposed rates would be reasonable.⁹⁶ A statement filed showing the cost of operation can have little weight when no witness is qualified to explain it.⁹⁷ In one proceeding an exhibit was introduced containing cumulative financial, operating, and traffic data for roads which were not parties to the case and did not participate in the movement involved; and the Commission naturally enough said that the bearing of these data upon the controversy before it was not

⁹⁰ Rates on Fresh Meats and Packing-House Products, 26 I. C. C. 154.

⁹¹ Boston Fruit & P. Exch. v. New York & N. E. R. R., 3 Int. Com. Rep. 493, 4 I. C. C. 664; and see Re Rates and Charges on Food Products, 3 Int. Com. Rep. 151, 155, 4 I. C. C. 116.

⁹² Fels & Co. v. Penna. Ry., 23 I. C. C. 483.

⁹³ Railroad Commission of Wis-

consin v. C. & N. W. Ry., 16 I. C. C. 85.

⁹⁴ People's Fuel & Supply Co. v. G. T. W. Ry., 27 I. C. C. 24.

⁹⁵ Detroit Switching Charges, 28 I. C. C. 494.

⁹⁶ Louisville & Nashville Railroad Coal and Coke Rates, 26 I. C. C. 20.

⁹⁷ Lumber from Louisiana to North Atlantic Points, 20 I. C. C. 186.

apparent.⁸⁸ Certainly it is not to be expected that an order condemning existing rates, awarding reparation, and establishing a rate for the future can be got from the Commission on a mere complaint, without appearance or evidence.⁸⁹ Where there is available definite proof, as the expense bills relating to the shipments, the case will be dismissed if the complainant fails to bring them in to prove his contentions.¹ A case will, therefore, be dismissed if the evidence is held insufficient to base a finding thereon.²

§ 1115. Proof of damage required.

Both the duty to make reparation and the amount of reparation to be made must be established by evidence. If the proof fails to establish either point satisfactorily the suit will be dismissed without prejudice.³ Or the case may, in the discretion of the Commission, be continued for further testimony.⁴ So proceedings before the Commission against carriers for discriminations and preferences will be stayed until final determination by the courts in suits pending therein for the enforcement of an order of the Commission, compliance with which by carriers operating in the territory will remove the discriminations and preferences complained of.⁵ It is obvious, however, that a shipper declaring false value to secure reduced rate is estopped, in case of loss or damage, from denying correctness of value given.⁶ It should be remembered, however,

⁸⁸ Lumber Rates from Texas, etc., to Oklahoma and Missouri, 28 I. C. C. 471.

⁸⁹ Quammen & Austad Lumber Co. v. C., M. & St. P. Ry., 19 I. C. C. 110.

¹ Roper Lumber Cedar Co. v. Chicago & N. W. Ry., 16 I. C. C. 397.

² Moore v. D. & R. G. R. R. Co., 25 I. C. C. 1.

³ Freeman v. Atchison, T. & S. F. R. R., 7 I. C. C. Rep. 202; Commercial Club of Omaha v. Chicago & N. W. Ry., 7 I. C. C. Rep. 386;

Castle v. Baltimore & O. R. R., 8 I. C. C. Rep. 333.

⁴ Business Men's League of St. Louis v. Atchison, T. & S. F. R. R., 9 I. C. C. Rep. 318; Richmond Elevator Co. v. Pere Marquette R. R., 10 I. C. C. Rep. 629; Dennison L. & P. Co. v. Missouri, K. & T. Ry., 10 I. C. C. Rep. 337.

⁵ Southern Paint & G. Co. v. Lake Erie & W. Ry., 6 I. C. C. Rep. 284.

⁶ In re Express Rates, 28 I. C. C. 132.

that the Act expressly provides that in case of proceedings brought to reform rates for the failure, there shall be no dismissal of the complaint by reason of a showing of no damage to the complainant by present conditions.

§ 1116. Presumptions from voluntary continuance.

Voluntary continuance of a given rate for a long time by a carrier, while not conclusive, creates a presumption that the rate is reasonable.⁷ The presumption is in the nature of an admission by the carrier, and therefore exists only in a case where the carrier alters a long-existing rate by raising it. If, on the other hand, the carrier voluntarily reduces a rate, in the absence of evidence of another reason for the reduction, it will be presumed that the former rate was unreasonably high.⁸ This presumption, however, being based on an admission of the carrier, is confined to cases where the prior rate was established and continued by the voluntary act of the carrier; it does not attach in a case where such rates have been established by carriers in compliance with the decision and order of the Commission.⁹ A presumption of fact may be raised by the disproportion of two rates upon comparison. So where there is a great disproportion between two rates on the same road, or on different parts of the same line, there is a presumption against the reasonableness of the higher rate.¹⁰ So where certain rates were artificially enhanced by a traffic association for the purpose of carrying out an agreed division of territory between railroads, the rates were presumably unreasonable.¹¹ In the same way

⁷ *Re Export & Domestic Rates*, 7 I. C. C. Rep. 214; *Holmes v. Southern R. R.*, 8 I. C. C. Rep. 561; *National Hav. Ass'n v. Lake Shore & M. S. R. R.*, 9 I. C. C. Rep. 264.

⁸ *Holmes v. Southern R. R.*, 8 I. C. C. Rep. 561.

⁹ *Proctor & Gamble Co. v. Cincinnati, H. & D. R. R.*, 9 I. C. C. Rep. 440.

¹⁰ *Samuels v. Louisville & N. R. R.*, 4 Int. Com. Rep. 420; *Troy Board of Trade v. Alabama Midland Ry.*, 6 I. C. C. Rep. 1; *James v. Canadian Pac. R. R.*, 4 Int. Com. Rep. 274, 5 I. C. C. 612; *Rea v. Mobile & O. R. R.*, 7 I. C. C. Rep. 43.

¹¹ *Freight Bureau v. Cincinnati, N. O. & T. P. R. R.*, 6 I. C. C. Rep. 195.

disproportion between rates on similar commodities will lead to a presumption against the higher rate. So where grain and grain products are classified alike, they are presumptively entitled to equal rates; and if a difference is made by a carrier, it assumes the burden of sustaining it by satisfactory evidence.¹² Any presumption, from long maintenance, that rate was sufficiently high may be weakened by showing that past rate was induced by competition.¹³ There is no presumption of law that rate condemned as unreasonable or reduced by carrier, was unreasonable for any particular period in past.¹⁴

§ 1117. Admissions by making changes.

In the case of a competitive rate, however, long maintenance is not conclusive evidence that it was sufficiently high.¹⁵ But, even so, there is a certain presumption that rates largely the product of competition are reasonable rates.¹⁶ Reduction to meet competitive rate via short line, is not an admission of unreasonableness of former rate.¹⁷ And as has been seen, voluntary reduction is not of itself evidence of unreasonableness of former rates.¹⁸ And the maintenance of rate for eight years is a strong admission against carrier that higher rate would be unreasonable, unless explained.¹⁹ The existence of a lower rate in the somewhat remote past does not necessarily prove anything of value in ascertaining the reasonableness of a rate existing to-day.²⁰ The long maintenance of an

¹² *McMorran v. Grand Trunk Ry.*, 2 Int. Com. Rep. 604, 3 I. C. C. 252.

¹³ *Audley Hill & Co. v. S. Ry.*, 20 I. C. C. R. 225; *Commercial Club of Omaha v. S. P. Co.*, 20 I. C. C. 631.

¹⁴ *Anadarko Cotton Oil Co. v. A., T. & S. F. Ry.*, 20 I. C. C. R. 43; *Riverside Mills v. G. R. R.*, 20 I. C. C. 423.

¹⁵ *Audley Hill & Co. v. S. Ry.*, 20 I. C. C. 225.

¹⁶ *In re Advances in Rates, Eastern Case*, 20 I. C. C. 243.

¹⁷ *American Cigar Co. v. P. & R. Ry.*, 20 I. C. C. 81; *Georgia-Carolina Brick Co. v. S. Ry.*, 20 I. C. C. 148.

¹⁸ *Carstens Packing Co. v. S. P. Co.*, 20 I. C. C. 165; *Maxwell v. W. F. & N. W. Ry.*, 20 I. C. C. 197.

¹⁹ *Arlington Heights Fruit Exchange v. S. P. Co.*, 22 I. C. C. 149.

²⁰ *Enterprise Manufacturing Co. v. Ga. R. R.*, 12 I. C. C. 130.

adjustment of rates on different branches of a road will be held to be practically an admission by the carrier that the relation is a fair one.²¹ Where a reduction is made to comply with an order of the Commission, such reduction cannot be regarded as an admission that the former rate was unreasonable.²² The fact that a certain sum for a transit service is fixed upon as the charge throughout the country raises the presumption that this rate covers not only the cost of reconsignment service, but a reasonable profit as well.²³ Thus the fact that throughout substantially the entire country malt is carried at the same rate as barley creates a strong impression that such rate is compensatory.²⁴ An admission by parties in interest may relieve a carrier of burden of going forward with evidence.²⁵ While a stipulation of the parties may be accepted by the Commission, inasmuch as the Commission is charged with the enforcement of lawful rates, it cannot at all times accept the views of the parties as to what in fact is the lawful rate between given points on a specified commodity.²⁶

§ 1118. Privilege against self-crimination.

A witness is protected by the constitutional provision from being compelled to disclose the circumstances of his offense, or the sources from which or the means by which evidence of its commission, or of his connection with it, may be obtained or made effectual for his conviction. A statutory enactment must afford absolute immunity against future prosecution for the offense to which a criminalizing question relates, in order to supplant the constitutional privilege of a person to refuse to be a witness

²¹ *Clearfield Lumber Co. v. C. & O. Ry.*, 21 I. C. C. 211.

²² *Victor Mfg. Co. v. S. Ry.*, 21 I. C. C. 222.

²³ *Detroit Traffic Ass'n v. L. S. & M. S. Ry.*, 21 I. C. C. 257.

²⁴ *Texas Brewing Co. v. A., T. & S. F. Ry.*, 21 I. C. C. 171.

²⁵ *Wisconsin State Millers' Ass'n v. C., M. & St. P. Ry.*, 23 I. C. C. 494.

²⁶ *Germain Co. v. N. O. & N. E. R. R.*, 17 I. C. C. 22.

against himself.²⁷ The constitutional guaranty of protection against being compelled in any criminal case to be a witness against one's self is sufficiently satisfied by the provision of the Act as it now reads. In what is now the leading case,²⁸ the Supreme Court said: "If, as was justly observed in the opinion of the court below, witnesses standing in Brown's position were at liberty to set up an immunity from testifying, the enforcement of the interstate commerce law or other analogous Acts, wherein it is for the interest of both parties to conceal their misdoings, would become impossible, since it is only from the mouths of those having knowledge of the inhibited contracts that the facts can be ascertained. While the constitutional provision in question is justly regarded as one of the most valuable prerogatives of the citizen, its object is fully accomplished by the statutory immunity, and we are therefore of opinion that the witness was compellable to answer."

§ 1119. Adverse interest of witnesses not to be considered.

In proceedings like those before the Commission, which are judicial in their nature, and fairly governed by the rules and principles of law we have stated, it will not be said to be a sufficient excuse for making a preliminary order for a general production of books, papers, and documents, that petitioner is apprehensive that witnesses might be unfriendly, and refuse to answer proper questions, or to give proper information. It is not to be assumed in advance that any railroad officer or agent, any more than any other witness, will refuse to respond to any question put to him, unless upon the advice of the counsel of the company that the question is improper. The probability would seem to be that the testimony of witnesses (taken at the railroad offices) would be as fully brought out by

²⁷ *Counselman v. Hitchcock*, 142 U. S. 547, 35 L. ed. 1110, 12 Sup. Ct. 195, 3 Int. Com. Rep. 816.

²⁸ *Brown v. Walker*, 161 U. S. 591, 40 L. ed. 819, 16 Sup. Ct. 644, 5 Int. Com. Rep. 369.

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deposition, as at the open sessions of the Commission.²⁹ But it may well be doubted whether a railroad company can safely rely, as evidence in its own behalf, upon a report made and filed by it elsewhere.³⁰

§ 1120. Testimony on both sides should be introduced.

It is not proper for railroad companies to withhold the larger part of their evidence from the Commission, and first adduce it in the Circuit Court in proceedings by the Commission to enforce its order. The purposes of the Act of Congress call for a full inquiry by the Commission in the first instance. The Commission is an administrative board, and the courts are only to be resorted to when the Commission prefers to enforce the provisions of the statute by a direct proceeding in the court, or when the orders of the Commission have been disregarded.³¹ If a production of the books is necessary in any case, the Commission would be disposed to hold the hearing, or at least order the testimony to be taken, at such place as would reduce the trouble and inconvenience, for it must be apparent that the mere labor of searching out the entries in these books and getting them together from the vast accumulations of a railroad office, running through long periods of time, would be enormous, and that their production at a far distant point, for the purposes of a hearing, in indefinite number and quantity, might be unjustly oppressive, as well as very seriously inconvenient.³²

§ 1121. Production of books and papers.

An application for the compulsory production of books and papers³³ to the Commission for *subpœna duces tecum*

²⁹ Bragg, Commissioner, in *Rice v. Cincinnati, W. & B. R. R.*, 2 Int. Com. Rep. 584, 3 I. C. C. 186. *v. Richmond & D. R. R.*, 2 Int. Com. Rep. 193, 2 I. C. C. 304.

³⁰ *Seaboard Air L. R. Co. v. Florida*, 203 U. S. 261, 27 Sup. Ct. R. (U. S.) 109, aff'g s. c. 48 Fla. 129, 37 So. 314, and 48 Fla. 150, 37 So. 658. ³² *Rice v. Cincinnati, W. & B. R. R.*, 2 Int. Com. Rep. 584, 3 I. C. C. 186.

³¹ See *Spartanburg Board of Trade* ³³ *Rice v. Cincinnati, W. & B. R. R.*, 2 Int. Com. Rep. 584, 3 I. C. C. 186.

may be denied, as applicable to contracts and papers of third persons not before the Commission, on the ground of injustice that might be done such persons.³⁴ The parties may take depositions, by consent, in advance of the hearing; or witnesses may be subpoenaed from the different companies proceeded against, and a notice served with the subpoena requiring the witness to furnish the published rates and tariffs of such company, for a specified period, and also requiring them to furnish statements of the actual charges made and car facilities furnished, during such period, to the persons named in the application, if different from the published tariffs and schedules. The Commission, having suggested these modes of procedure, has added that if a railroad company, or its officers, should refuse to furnish the proper evidence from its books in some such reasonable manner as is here indicated, it might then become necessary to resort to harsher proceedings, either by an examination of its books by a representative of the Commission, or by requiring the production of the books by compulsory process, and if need be, through the exercise of the authority of the courts, as provided in the statute.³⁵

§ 1122. Burden of establishing case.

The complainant has the burden of establishing his case. Where a claim for reparation is made in a complaint of unreasonable railroad rates, the burden of proof is on complainant to prove the rates unreasonable.³⁶ He has also the burden of showing what a reasonable rate would be, so as to show the excess.³⁷ And so a railroad company which seeks to release itself from its agreement to deliver

³⁴ *Haddock v. Delaware, L. & W. R. R.*, 3 Int. Com. Rep. 302, 4 I. C. C. 296.

³⁵ *Commissioner, in Rice v. Cincinnati, W. & B. R. R.*, 2 Int. Com. Rep. 584, 3 I. C. C. 186.

³⁶ *Harding v. Chicago & A. R. R.*,

1 Int. Com. Rep. 375; *Perry v. Florida, C. & P. R. R.*, 3 Int. Com. Rep. 740, 5 I. C. C. 97; *Brownell v. Columbus & C. M. R. R.*, 4 Int. Com. Rep. 285, 5 I. C. C. 638.

³⁷ *Holmes v. Southern R. R.*, 8 I. C. C. Rep. 561.

goods for a specified freight rate, on the ground that the contract is illegal because the rate specified is less than that fixed by the Interstate Commerce Commission, has the burden of proving that the contract was necessarily unlawful, and not merely that it might have been so.³⁸ The burden of proof of the unreasonableness of a rate may, therefore, be said to be clearly on the complainant.³⁹ Where a complainant seeks to disturb a rate adjustment of long standing he should take upon himself the burden of establishing clearly the necessity for an investigation and the reasonableness of its demand.⁴⁰ In awards of reparation there must be that degree of certainty and satisfactory conviction in the mind and judgment of Commission as would be necessary under well-established principles of law as the basis for judgment in a court.⁴¹ The Commission cannot demand conclusive proof of unreasonableness; the preponderance of evidence is, of course, sufficient.⁴² Where rates were reduced at one point while no reduction was made at a related point, the burden would be upon the carrier to explain such adjustment.⁴³ And the burden of proof is on the carrier to justify any departure from the general rule prescribed by the Act by showing that the circumstances and conditions attending the long and short hauls respectively are substantially dissimilar.⁴⁴

§ 1123. Burden of justifying advances.

Under the Act as amended in 1910 the burden is on the

³⁸ *Southern Pacific Co. v. Redding* (Tex. Civ. App.), 43 S. W. 1061.

³⁹ *Loftus v. Pullman Co.*, 19 I. C. C. 102.

⁴⁰ *Taylor v. M. P. Ry.*, 15 I. C. C. 165.

⁴¹ *Anadarko Cotton Oil Co. v. A., T. & S. Ry.*, 20 I. C. C. 43.

⁴² *Thompson Lumber Co. v. I. C. C.*, 193 Fed. 682.

⁴³ *In re Advances on Cement*, 24 I. C. C. 290.

⁴⁴ *Re Louisville & Nashville R. Co.*, 1 Int. Com. Rep. 278, 1 I. C. C. 31; *Spartanburg Board of Trade v. Richmond & D. R. R.*, 2 Int. Com. Rep. 193, 2 I. C. C. 304; *Re Chicago, S. P. & K. C. R. R.*, 2 Int. Com. Rep. 137, 2 I. C. C. 231; *Raworth v. Northern Pacific R. R.*, 3 Int. Com. Rep. 857, 5 I. C. C. 234; *Phillips v. Louisville & N. R. R.*, 8 I. C. C. Rep. 93.

carrier to prove the reasonableness of advanced rates.⁴⁵ Carriers must satisfy minds of Commission that advanced rates are just and reasonable; under English Act burden is on carrier to justify "the increase of the rate," but under our Act of 1910 the burden is on the carrier to show that the "increased rate" is reasonable.⁴⁶ The burden is also on the carrier, under the fourth section as amended in 1910, to justify a deviation from the long-short-haul clause.⁴⁷ To justify a departure from the fourth section as amended the carrier must prove that by such deviation no provision of the Act will be violated and that no injustice will be done to the intermediate point.⁴⁸ The burden of proof being on the defendant, sufficient reason must be shown why articles should be advanced in official classification from second to first class.⁴⁹ And the withdrawal of through rates, leaving a higher combination in effect, casts the burden of justifying this advance upon the carriers.⁵⁰ Likewise the withdrawal of proportional rates, leaving higher local rates in effect, casts the burden upon the carriers.⁵¹ And the burden of justifying increased minimum weight falls upon the carriers.⁵² A carrier must prove that the advanced rate is reasonable and that it does not result in unjust discrimination or undue prejudice.⁵³ The burden of proof to justify a suspended advance being upon the carriers, if they fail to sustain such burden the advance will not be permitted.⁵⁴

⁴⁵ In re Investigation of Advances in Rates on Grain, 21 I. C. C. R. 22; In re Advances in Rates on Locomotives and Tenders, 21 I. C. C. R. 103.

⁴⁶ In re Advances in Rates, Eastern Case, 20 I. C. C. 243; In re Advances in Rates, Western Case, 20 I. C. R. 307.

⁴⁷ City of Spokane v. N. P. Ry., 21 I. C. C. 400; Railroad Commission of Nevada v. S. P. Co., 21 I. C. C. 329.

⁴⁸ Railroad Commission of Nevada v. S. P. Co., 21 I. C. C. 329.

⁴⁹ Davis Sewing Machine Co. v. P. C. C. & St. L. Ry., 22 I. C. C. 291.

⁵⁰ In re Advances on Coal, 23 I. C. C. R. 518.

⁵¹ Wisconsin State Millers' Ass'n v. C., M. & St. P. Ry., 23 I. C. C. 494.

⁵² In re Advances on Potatoes, 23 I. C. C. 69.

⁵³ In re Advances on Barley, 20 I. C. C. 664.

⁵⁴ In re Advances on Iron and Steel Articles, 22 I. C. C. 486.

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It might be noted in this connection that on February 11, 1915, the Commission gave notice of a ruling to the effect that where schedules containing advances in rates are filed, the carrier should fully state the extent of the advances and the reasons relied upon by it to justify them, and that it was also highly desirable that protestants against any such advances should file their objections with the Commission before the date set in the schedule for their going into effect unless suspended.

CHAPTER XXIV

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- 1163.** Recovery on a reparation order of the Commission.
- 1164.** Findings of the Commission as evidence.

§ 1130. Provisions of the Act.

The Act for the creation of the Commerce Court provided that it should have the jurisdiction then possessed by the United States circuit courts over (1) all cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Commission other than for the payment of money; (2) all cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Commission; (3) certain cases under the Elkins Act, and (4) certain mandamus proceedings. The District Court Jurisdiction Act of October 22, 1913 abolished the Commerce Court, and provided that its jurisdiction "should be transferred to and vested in the several district courts of the United States." If after a hearing on a complaint, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of the Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named. If a carrier does not comply with an order for the payment of money within the time limit in such order, the Act formerly provided that the complainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims dam-

ages, and the order of the Commission in the premises. But it is somewhat doubtful as to how much this has been modified by the venue clause of the District Court Jurisdiction Act of 1913, which provides that the venue of all suits for the enforcement of the Act shall be in the judicial district wherein is the residence of any of the parties upon whose petition the order was made. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the district court within one year from the date of the order, and not after. In such suits all parties in whose favor the Commission may have made an award for damages by a single order may be joined as plaintiffs, and all of the carrier parties to such order awarding such damages may be joined as defendants, and such suit may be maintained by such joint plaintiffs and against such joint defendants in any district where any one of such joint plaintiffs could maintain such suit against any one of such joint defendants; and service of process against any one of such defendants as may not be found in the district where the suit is brought may be made in any district where such defendant carrier has its principal operating office. In case of such joint suit the recovery, if any, may be by judgment in favor of any one of such plaintiffs against the defendant found to be liable to such plaintiff.

§ 1131. Further provisions.

Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of section fifteen of this Act shall forfeit to the United States the sum of five thousand dollars for each offense. Every distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense. The forfeitures provided for in this Act shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States, brought in the district where the carrier has its principal operating office, or in any district through which the road of the carrier runs. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States. If any carrier fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Interstate Commerce Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the district court for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it or them obedience to the same. The venue of any suit brought to enforce, suspend, or set aside, in whole or in part, any order of the Commission is in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where

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the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the Commission arises, and except that when the order does not relate to transportation or to a matter so complained of before the Commission, the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office, or its principal operating office. The procedure in the district courts in respect to cases on which jurisdiction is conferred upon them by the District Court Jurisdiction Act is the same as that which prevailed in the Commerce Court. Any application for an interlocutory injunction suspending or restraining any order of the Commission must be presented to three judges, at least one of whom must be a circuit judge, and may be granted only with the concurrence of a majority of such judges. In a case where irreparable damage is threatened, by the same procedure and after three days' notice to the Commission and to the Attorney General, a temporary restraining order may be granted. An appeal may be taken direct to the Supreme Court from an order granting or denying an interlocutory injunction if taken within 30 days, or from a final judgment or decree, if taken within 60 days. The hearing upon an application for an interlocutory injunction shall be in every way expedited and be assigned for a hearing at the earliest practicable day. In order to discharge the duties imposed upon it by the Act, the Commission is empowered to require by subpoena the attendance and testimony of witnesses and the production of papers. Should the Commission require the assistance of the courts to obtain necessary evidence, the Act authorizes the district courts to compel the attendance of witnesses and the production of papers. Testimony thus given may not be used against the witness in any subsequent criminal proceeding. In passing upon the Commission's application, the courts will determine whether the testimony or papers are required for a purpose

within the Commission's jurisdiction. On application of the Attorney General at the request of the Commission, alleging a violation of any provision of the Act by a carrier, the district courts may enforce the same by a writ of mandamus. Nothing in the Act shall in any way abridge or alter any of the remedies already existing at common law or by statute, but the remedies provided by the Act are in addition thereto.

§ 1132. Jurisdictional limitations upon Commission action.

The Supreme Court of the United States has several times within the past few years enumerated the various classes of cases in which it has concluded that it is its duty to set aside the action of the Interstate Commerce Commission. In one case the following were set forth as the grounds for taking such action. In determining whether an order of the Commission shall be suspended or set aside, the Supreme Court must consider (a) all relevant questions of constitutional power or right; (b) all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and (c) whether, even although the order be in form within the delegated power, nevertheless, it must be treated as not embraced therein, because its authority has been manifested in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power; but (d) the Supreme Court may not, under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful order upon its conception as to whether the administrative power has been wisely exercised.⁵⁵ It will be noted that by putting (a) and (b) first in order the court emphasizes the fundamental distinction; and it then not improperly adds such working rules as (c) and (d), which might upon analysis be resolved into the

⁵⁵ Interstate Commerce Commission v. Illinois Central Ry., 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. 155.

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elementary principles. In a recent case is given a still more elaborate list of instances in which the courts will set aside the orders of the Commission. "There has been no attempt to make an exhaustive statement of the principle involved, but in cases thus far decided, it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power." ⁵⁶ While it has long been the tendency of the courts in the interest of justice to enlarge their jurisdiction by construction in cases of reasonable doubt, a similar course on the part of an administrative and quasi-legislative body, such as the Commission, would be of questionable propriety. Being a special tribunal, it ought not in any event to enlarge its territorial jurisdiction by intendment, but should exercise its powers only under the clearly expressed authority of the Act.⁵⁷

§ 1133. The nature of the Commission.

The somewhat mixed functions of the Commission and its peculiar status are indicated by the various descriptive terms which have been applied to it by both the Commission and the courts. It has been held to be a body corporate

⁵⁶ *Interstate Commerce Commission v. Union Pacific Ry.*, 222 U. S. 541, 56 L. ed. 308, 32 Sup. Ct. 108.

⁵⁷ *In re Jurisdiction in Alaska*, 19 I. C. C. 81, 93.

with legal capacity to appear as party plaintiff or defendant in the Federal courts.⁵⁸ It has also been described as an administrative board⁵⁹ or an administrative tribunal.⁶⁰ It has frequently been held to have quasi-judicial power,⁶¹ and in one case it was said that its functions were those of referees or special commissioners.⁶² Before the rate law of 1906 the Supreme Court held that it was vested with powers partly judicial and partly executive, but not legislative.⁶³ But in a recent case the Supreme Court, in distinguishing the Commission's power to award reparation and its authority to fix rates, uses these words: "One is made by the Commission in its quasi-judicial capacity to measure past injuries sustained by a private shipper; the other in its quasi-legislative capacity, to prevent future injury to the public."⁶⁴ The Commission has characterized itself as an administrative body,⁶⁵ and as an administrative and quasi-legislative body,⁶⁶ but with a jurisdiction analogous to that of a court of equity.⁶⁷ It has further said that it is "a select jury to pass upon the reasonableness and justice of railroad rates, rules and practices."⁶⁸ The authority of the Commission to control the charges of carriers was for a long time

⁵⁸ *Texas & Pacific Ry. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. ed. 940, 16 Sup. Ct. 666.

⁵⁹ *Cincinnati, N. O. & T. P. Ry. v. Interstate Commerce Commission*, 162 U. S. 184, 40 L. ed. 935, 27 Sup. Ct. 948.

⁶⁰ *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. 350.

⁶¹ *Interstate Commerce Commission v. C., N. O. & T. P. Ry.*, 64 Fed. 981; *Interstate Commerce Commission v. L. & N. Ry.*, 73 Fed. 409; *Interstate Commerce Commission v. C., N. O. & T. P. Ry.*, 76 Fed. 183; *Texas & Pacific Ry. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. ed. 940, 16 Sup. Ct. 666;

Interstate Commerce Commission v. C., N. O. & T. P. Ry., 167 U. S. 479, 42 L. ed. 243, 17 Sup. Ct. 896.

⁶² *K. & I. B. Co. v. L. & N. Ry.*, 37 Fed. 567.

⁶³ *Interstate Commerce Commission v. C., N. O. & T. P. Ry.*, 167 U. S. 479, 42 L. ed. 243, 17 Sup. Ct. 896.

⁶⁴ *Baer Brothers v. D. & R. G. Ry.*, 233 U. S. 479, 58 L. ed. 1055, 34 Sup. Ct. 641.

⁶⁵ *M. & K. Shippers' Ass'n v. M., K. & T. Ry.*, 12 I. C. C. 483.

⁶⁶ *In re Jurisdiction in Alaska*, 19 I. C. C. 81.

⁶⁷ *Railway Commission of Ohio v. H. V. Ry.*, 12 I. C. C. 398.

⁶⁸ *In re Advances in Rates—Western Case*, 20 I. C. C. 307.

a subject of controversy, because the vesting of such authority in the Commission seemed to be a delegation by Congress of its legislative power. This doubt was due to the fact that in common-law jurisdictions the distinction between legislation and administration has not been extensively applied, and even yet, courts which do not question the constitutionality of the powers vested in administrative commissions continue to describe them as legislative bodies.⁶⁹ In the case of the Commission, however, it is now well recognized that its authority over the charges of carriers is administrative rather than legislative. Congress has laid down general rules with regard to rates and has created the Commission as an administrative agent for the purpose of enforcing them.⁷⁰

§ 1134. The functions of the Commission.

A fundamental function of the Commission is to make findings of fact in the cases which come before it. Whether a rate is reasonable,⁷¹ or discriminatory,⁷² whether a carrier's

⁶⁹ The courts may not substitute their judgment as to rates "for that of the legislature or of the railroad commission exercising its delegated power." *Louisville & Nashville Ry. v. Garrett*, 231 U. S. 298, 58 L. ed. 229, 34 Sup. Ct. 48.

⁷⁰ *Buttfield v. Stranahan*, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. 349; *Union Bridge Co. v. United States*, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. 367; *United States v. Grimaud*, 220 U. S. 506, 55 L. ed. 563, 31 Sup. Ct. 480; *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194, 56 L. ed. 729, 32 Sup. Ct. 436; *Kansas City Southern Ry. v. United States*, 231 U. S. 423, 58 L. ed. 296, 34 Sup. Ct. 125.

⁷¹ *Cincinnati, N. O. & T. P. Ry. v. Interstate Commerce Commission*, 162 U. S. 184, 40 L. ed. 935, 16 Sup. Ct. 700; *Texas & Pacific Ry. v.*

Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 16 Sup. Ct. 666; *Illinois Central Ry. v. Interstate Commerce Commission*, 206 U. S. 441, 51 L. ed. 1128, 27 Sup. Ct. 700; *Interstate Commerce Commission v. C., R. I. & P. Ry.*, 218 U. S. 88, 54 L. ed. 946, 30 Sup. Ct. 651; *So. Pac. Ry. v. Interstate Commerce Commission*, 219 U. S. 433, 55 L. ed. 283, 31 Sup. Ct. 288; *Interstate Commerce Commission v. Nor. Pac. Ry.*, 222 U. S. 541, 56 L. ed. 308, 32 Sup. Ct. 108; *Louisville & Nashville Ry. v. Garrett*, 231 U. S. 298, 58 L. ed. 229, 34 Sup. Ct. 48; *Atchison, T. & S. F. Ry. v. United States*, 232 U. S. 199; *Boston & Maine Ry. v. Hooker*, 233 U. S. 97, 58 L. ed. 868, 34 Sup. Ct. 526.

⁷² *Illinois Cent. Ry. v. Interstate Commerce Commission*, 206 U. S. 441, 51 L. ed. 1128, 27 Sup. Ct. 700;

practice operates as a preference,⁷³ whether a spur-track is part of a carrier's terminal facilities,⁷⁴ whether there is competition between carriers,⁷⁵—all these are questions of fact, which are peculiarly within the province of the Commission. The latter is an expert body,⁷⁶ and its findings are treated with the respect "due to the judgments of a tribunal appointed by law and informed by experience." When based upon evidence, the Commission's determinations of fact are conclusive, and will not be re-examined in the courts.⁷⁷ "This court," said Justice Hughes, "cannot substitute its judgment for that of the Interstate Commerce Commission upon matters of fact within the province of the Commission."⁷⁸ Even when the facts are undisputed, it is the judgment of the Commission and not of the courts which is to govern. And if the Commission, through an erroneous construction of the Act, has failed to find the facts, the courts will not themselves proceed to an original investigation, but will correct the error of law and remand the case to the Commission for the due discharge of its functions.⁷⁹ Even if the language of the Act

Baltimore & Ohio Ry. v. United States, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. 164; *Interstate Commerce Commission v. D., L. & W. Ry.*, 220 U. S. 235, 55 L. ed. 448, 31 Sup. Ct. 392.

⁷³ *Baltimore & Ohio Ry. v. Pitcairn Coal Co.*, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. 164; *Interstate Commerce Commission v. D., L. & W. Ry.*, 220 U. S. 235, 55 L. ed. 448, 31 Sup. Ct. 392.

⁷⁴ *Los Angeles Switching Case*, 234 U. S. 294, 58 L. ed. 1319, 34 Sup. Ct. 814.

⁷⁵ *Illinois Central Ry. v. Interstate Commerce Commission*, 206 U. S. 441, 51 L. ed. 1128, 27 Sup. Ct. 700.

⁷⁶ *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. 418; *Joynes v. Penn. Ry.*, 17 I. C. C. 361.

⁷⁷ *Illinois Central Ry. v. Interstate Commerce Commission*, 206 U. S.

441, 51 L. ed. 1128, 27 Sup. Ct. 700; *Baltimore & O. R. Co. v. United States*, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164; *Interstate Commerce Commission v. Delaware, L. & W. R. Co.*, 220 U. S. 235, 55 L. ed. 448, 31 Sup. Ct. Rep. 392; *Interstate Commerce Commission v. Union P. R. Co.*, 222 U. S. 541, 56 L. ed. 308, 32 Sup. Ct. Rep. 108; *Interstate Commerce Commission v. Louisville & N. R. Co.*, 227 U. S. 88, 57 L. ed. 431, 33 Sup. Ct. Rep. 185; *Atchison, T. & S. F. R. Co. v. United States*, 232 U. S. 199, 58 L. ed. 568, 34 Sup. Ct. Rep. 291; *Los Angeles Switching Case*, 234 U. S. 294, 58 L. ed. 1319, 34 Sup. Ct. 814.

⁷⁸ *United States v. L. & N. Ry.*, 235 U. S. 314, 35 Sup. Ct. 113.

⁷⁹ *Interstate Commerce Commission v. Clyde Steamship Co.*, 181 U. S. 29, 45 L. ed. 729, 21 Sup. Ct. 512.

were not clear, it is obvious that the ends which Congress had in view in the enactment of the Act and its amendments could not be attained by any other construction. This body of legislation imposes upon both carriers and shippers many obligations to which they had not before been subject, and these require, in the words of Chief Justice White, "official unity of action which could only be brought about by a single administrative initiative and primary control. To that end the Act (sec. 11) created an administrative body endowed with what may be in some respects qualified as quasi-judicial attributes, to whom was confided the enforcement of those provisions of the Act which essentially exacted unity in order that they might beneficially operate."⁸⁰ Such being the function of the Commission, it must be allowed a large degree of discretion as to the evidence upon which it will base its judgments,⁸¹ and its findings must be given a presumption of truth.⁸² Hence in proceedings brought to enforce an order of the Commission, a carrier which disputes the finding of facts upon which it was based must assume the burden of proof.⁸³ But on the other hand, should the Commission abuse its discretion and under the guise of an administrative order should draw up what would amount to a code, such action would transcend its administrative functions and would be invalid.⁸⁴

⁸⁰ *Proctor and Gamble v. United States*, 225 U. S. 282, 56 L. ed. 1091, 32 Sup. Ct. 761; *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. 350; *Mitchell Coal Co. v. Penn. Ry.*, 230 U. S. 247, 57 L. ed. 1472, 33 Sup. Ct. 916.

⁸¹ *Louisville & Nashville Ry. v. Interstate Commerce Commission*, 184 Fed. 118, 195 Fed. 541; *Atchison, Topeka & Santa Fe Ry. v. United States*, 203 Fed. 56.

⁸² *Interstate Commerce Commission v. Louisville & Nashville Ry.*, 102 Fed. 709, 118 Fed. 616; *Atlantic*

Coast Line Ry. v. Florida, 203 U. S. 256, 51 L. ed. 174, 27 Sup. Ct. 108; *Illinois Cent. Ry. v. Interstate Commerce Commission*, 206 U. S. 441, 51 L. ed. 1128, 27 Sup. Ct. 700; *Interstate Commerce Commission v. C., R. I. & P. Ry.*, 218 U. S. 88, 54 L. ed. 946, 30 Sup. Ct. 651.

⁸³ *Interstate Commerce Commission v. L. & N. Rd. Co.*, 118 Fed. 613; *Interstate Commerce Commission v. C. H. & D. Ry.*, 146 Fed. 559.

⁸⁴ *La. & Pac. Ry. v. United States*, 209 Fed. 24.

§ 1135. Preliminary action by the Commission necessary.

Section 9 of the Act provides that any persons claiming to be damaged by any common carrier subject to the Act may either make complaint to the Commission in the prescribed mode or may bring suit in their own behalf in any district court of the United States of competent jurisdiction, for the recovery of the damages for which the carrier may be liable under the Act. But no one may pursue both of these remedies, and election must be made between them. Section 22 provides that nothing in this Act shall in any way abridge or alter the remedies already existing at common law or by statutes, but the provisions of this Act are in addition to such remedies. The language of these sections led to the assertion of the claim that a shipper who had been subjected to an unreasonable or discriminatory charge might exercise a choice as to whether he would appeal to the courts for redress or would complain to the Commission. It is obvious, however, that such a construction would defeat one of the chief purposes of the Act, which was to insure that rates should be uniform and non-discriminatory. To this end carriers are required to file their rate schedules with the Commission, and these then become the only legal charges until they are altered as provided by law. But if it were possible for shippers, without a prior hearing by the Commission, to appeal to the courts for an award of damages on the ground that the rates so established are unreasonable, the result would inevitably be such a variety of decisions by the various courts that no uniform standard of rates would be possible, and the Commission would be powerless to maintain that equality and uniformity of rates which the Act makes it its duty to maintain. Hence the courts hold that under sections 9 and 22 an individual will be heard by the courts only in those cases in which they can grant redress consistently with the context of the Act without previous action by

the Commission.⁸⁵ Plainly complaints as to unreasonable rates are not included in this category. Hence in cases in which the court was asked to enforce orders which it found that the Commission was not authorized to issue, it did not itself undertake an investigation of the question of the reasonableness of the rate involved, but remanded that question for action by the Commission.⁸⁶ "Primary interference of the courts with the administrative functions of the Commission is wholly incompatible with the Act."^{86a} The Commission is the tribunal instituted by the government to inquire primarily into the fact as to whether a discrimination exists. Until an inquiry is there made, and a finding and order had, the jurisdiction of a court of equity may not be invoked to restrain an alleged discrimination.^{86b} No court can enjoin the filing by a railway of an interstate rate on the ground that it is discriminatory in advance of action by the Commission.⁸⁷ Since the rate filed with the Commission is the only legal rate, it is the standard of what is reasonable so far as courts and juries are concerned,⁸⁸ and a shipper cannot maintain an action

⁸⁵ *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. 350; *So. Ry. v. Tift*, 206 U. S. 428, 51 L. ed. 1124, 27 Sup. Ct. 709; *Louisville & N. Ry. v. Cook Brewing Co.*, 223 U. S. 70, 56 L. ed. 355, 32 Sup. Ct. 189; *Gt. No. Ry. v. O'Connor*, 232 U. S. 508, 58 L. ed. 703, 34 Sup. Ct. 380; *Texas & Pac. Ry. v. American Tie & Timber Co.*, 234 U. S. 138, 58 L. ed. 1255, 34 Sup. Ct. 885; *American Sugar Refining Co. v. D., L. & W. Ry.*, 200 Fed. 652; *Jacoby v. Penn. Ry.*, 200 Fed. 989.

Even where the question involved is a constitutional question, if it is dependent upon provisions of the Interstate Commerce Act, it is subject to the precedent action of the Commission. *Proctor and Gamble v.*

U. S., 225 U. S. 282, 56 L. ed. 1091, 32 Sup. Ct. 761.

⁸⁶ *Cincinnati, N. O. & T. P. Ry. v. I. C. C.*, 162 U. S. 184, 40 L. ed. 935, 27 Sup. Ct. 948; *Louisville & Nashville Ry. v. Behlmer*, 175 U. S. 648, 40 L. ed. 309, 20 Sup. Ct. 208; *Interstate Commerce Commission v. L. & N. Ry.*, 190 U. S. 273, 47 L. ed. 1047, 23 Sup. Ct. 687; *United States v. M. C. Ry.*, 122 Fed. 544.

^{86a} *Baltimore & Ohio Ry. v. United States*, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. 164.

^{86b} *United States v. Mich. Cent. Ry.*, 122 Fed. 544.

⁸⁷ *Columbus Iron & Steel Co. v. K. & M. Ry.*, 178 Fed. 261.

⁸⁸ *Van Patten v. C., M. & St. P. Ry.*, 81 Fed. 545.

at common law in a State or Federal court to recover for an excess of freights exacted on an interstate shipment if the rates charged were those filed with the Commission,⁸⁹ nor can such an action be maintained in the Federal courts until application is first made to the Commission for the correction of the charge.⁹⁰

§ 1136. Certain consequences of this doctrine.

Whatever may be the legislation of a State a carrier cannot be prosecuted for charging more than the rate fixed in its bill of lading, but must comply with the Federal law and charge the rate filed with the Commission.⁹¹ The same result was reached when a carrier attempted by a special contract with a shipper to vary the rate filed with the Commission.⁹² Other cases in which it has been held that action by the Commission is a condition precedent to recourse to the courts involved suits for damages growing out of the granting of rebates to a shipper's competitors,⁹³ the refusal of a carrier to establish satisfactory through routes,⁹⁴ discrimination in the distribution of cars among shippers,⁹⁵ the exaction of discriminatory charges on coal when loaded from wagons and not from tipples,⁹⁶ a carrier's payment of discriminatory allowances to a shipper for transportation services rendered by him,⁹⁷

⁸⁹ *Robinson v. B. & O. Ry.*, 222 U. S. 506, 56 L. ed. 288, 32 Sup. Ct. 113; *Clement v. L. & N. Ry.*, 153 Fed. 979; *American Union Coal Co. v. Railway Co.*, 159 Fed. 278.

⁹⁰ *Clement v. L. & N. Ry.*, 153 Fed. 979.

⁹¹ *Gulf, Colorado & C. Ry. v. Hefley*, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. 802.

⁹² *Texas & Pacific Ry. v. Mugg*, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. 242.

⁹³ *Mitchell Coal & Coke Co. v. Penn. Ry.*, 183 Fed. 908.

⁹⁴ *United States v. Pacific & Arctic Co.*, 228 U. S. 87, 57 L. ed. 742, 33 Sup. Ct. 443.

⁹⁵ *Interstate Commerce Commission v. Ill. Cent. Ry.*, 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. 155; *Morrisdale Coal Co. v. Penn. Ry.*, 230 U. S. 304, 57 L. ed. 1494, 33 Sup. Ct. 938.

⁹⁶ *Robinson v. B. & O. Ry.*, 222 U. S. 506, 56 L. ed. 288, 32 Sup. Ct. 114.

⁹⁷ *Mitchell Coal & Coke Co. v. Penn. Ry.*, 230 U. S. 247, 57 L. ed. 1494, 33 Sup. Ct. 916.

discrimination growing out of the classification of commodities,⁸⁸ and suits in equity to prevent the filing or enforcement of schedules alleged to be unreasonable.⁸⁹ If, however, such a case be commenced without the necessary precedent application to the Commission, the court in remanding it for dismissal may stay the dismissal until the complainant has an opportunity to make such application, reserving meanwhile to the defendant the right to be heard on the defense of limitations as well as other defenses.¹ If primary jurisdiction is vested in the Commission, the parties cannot by stipulation vest it in the courts.² Although the Commission may have passed upon the question in other cases between other shippers and defendant carrier, nevertheless a shipper seeking reparation for violation of this ruling by a carrier must first apply to the Commission, as the case is not one of those which under section 9 may be brought originally either before the Commission or the courts.³ Nor does the fact that the allowance or discrimination was a past one relieve the shipper from primary recourse to the Commission for judgment as to its reasonableness.⁴ In all such cases the primary jurisdiction of the Commission will be respected by the courts. While in many cases they will review the action of the Commission, they will never anticipate it nor supplant it.

⁸⁸ *Texas & Pacific Ry. v. American Tie & Timber Co.*, 234 U. S. 138, 58 L. ed. 1255, 34 Sup. Ct. 884.

⁸⁹ *Great No. Ry. v. Kalispell Lumber Co.*, 165 Fed. 25; *Atlantic Coast Line v. Macon Grocery Co.*, 166 Fed. 206; *Columbus Iron & Steel Co. v. Kanawha & M. Ry.*, 171 Fed. 713; *Houston Coal & Coke Co. v. N. & W. Ry.*, 171 Fed. 723; *Columbus Iron & Steel Co. v. K. & M. Ry.*, 178 Fed. 261; *Wickwire*

Steel Co. v. N. Y. C. & H. R. Ry., 181 Fed. 316.

¹ *Mitchell Coal & Coke Co. v. Penn. Ry.*, 230 U. S. 247, 57 L. ed. 1494, 30 Sup. Ct. 916.

² *Mitchell Coal & Coke Co. v. Penn. Ry.*, 183 Fed. 908.

³ *Howard Supply Co. v. C. & O. Ry.*, 162 Fed. 188; *National Pole Co. v. C. & N. W. Ry.*, 200 Fed. 185.

⁴ *Mitchell Coal & Coke Co. v. Penn. Ry.*, 230 U. S. 247, 57 L. ed. 1494, 30 Sup. Ct. 916.

§ 1137. The right of appeal to the courts.

While the courts will not usurp the functions of the Commission as the tribunal designated by law to make the primary determination of facts, and while the findings of the Commission in the discharge of this function are made *prima facie* evidence of the facts in subsequent judicial proceedings and are received by the courts with a presumption of truth, yet since the Commission acts as a legislative or administrative board and not judicially in reaching its findings, its action as to questions of law involved is not final, but is subject to judicial review.⁵ When an issue of fact only is concerned, the right of appeal depends altogether upon the will of the legislature; but when the issue is as to questions of law, the parties concerned cannot be deprived of their right to a judicial determination. This was expressly provided for by Congress in the Act creating the Commerce Court to which was given jurisdiction over cases brought to enjoin, set aside, annul, or suspend, in whole or in part, any order of the Commission. Upon the abolition of the Commerce Court this jurisdiction was vested in the district courts. Quite apart, however, from these statutory provisions, the constitutional requirement of due process of law can only be satisfied by granting to any person deprived of property by an order of the Commission an opportunity to have his day in court. This is particularly true of rate regulations, which so directly affect property rights, and which therefore raise a judicial question the final determination of which remains with the courts.⁶ A statute which made the decision of a legislature or commission conclusive as to rates, or which forbade recourse to the courts would be clearly invalid,⁷ and a statute which

⁵ *Mo., Kan. & Texas Ry. v. Interstate Commerce Commission*, 164 Fed. 645; *Mitchell Coal & Coke Co. v. Penn. Ry.*, 230 U. S. 247, 57 L. ed. 1494, 30 Sup. Ct. 916.

134, 58 L. ed. 538, 34 Sup. Ct. 283; *Detroit & M. Ry. v. Michigan Railroad Commission*, 235 U. S. 402, 35 Sup. Ct. 136.

⁷ *Ex parte Young*, 209 U. S. 123,

⁶ *Bacon v. Rutland Ry.*, 232 U. S.

52 L. ed. 714, 28 Sup. Ct. 441; *Mo.*

sought to accomplish the same result indirectly, as by the infliction of outrageous penalties for disobedience to a commission's order pending appeal, would likewise be void.⁸ It is the substantial right of a judicial hearing that is protected, however the attack upon it may be veiled. But the mere failure to make explicit provision for an appeal from a commission to the courts is not construed as a denial of the right.⁹ Presumably it was intended that such a right should be enjoyed, and this presumption yields only to the plain provisions of the statute, which in turn must yield to the superior authority of the Federal Constitution. But the right to a judicial hearing as to the validity of orders of the Interstate Commerce Commission applies only to its affirmative orders. If the Commission denies the redress which the petitioner seeks at its hands, he has no remedy.¹⁰ This situation has led the Commission to say, "In doubtful cases the Commission will not overlook the fact that if it errs in construing the law against the complainant he has no relief, since no appeal will lie from the Commission's decision."¹¹ "As to the shipper, this tribunal is his one and only resort against injustice."¹² But cases in which the Commission denies relief, because not convinced that it should be given, should be distinguished from cases in which it denies relief because it holds that the relief asked for is not within its jurisdiction. In the former class of cases the decision of the Commission is final, but in the latter, if the Commis-

Pac. Ry. v. Tucker, 230 U. S. 340, 57 L. ed. 1507, 33 Sup. Ct. 961.

⁸ *Mo. Pac. Ry. v. Nebraska*, 217 U. S. 196, 54 L. ed. 727, 30 Sup. Ct. 461; *Chesapeake & Ohio Ry. v. Conley*, 230 U. S. 513, 57 L. ed. 1597, 33 Sup. Ct. 985; *Wadley Southern Ry. v. Georgia*, 235 U. S. 651, 35 Sup. Ct. 214.

⁹ *Louisville & Nashville Ry. v. Garrett*, 231 U. S. 298, 58 L. ed. 229, 34 Sup. Ct. 48.

¹⁰ *Proctor and Gamble v. United States*, 225 U. S. 282, 56 L. ed. 1091, 32 Sup. Ct. 761; *Hooker v. Knapp*, 225 U. S. 302, 56 L. ed. 1069, 32 Sup. Ct. 769; *Western N. Y. & P. Ry. v. Penn Refining Co.*, 137 Fed. 343.

¹¹ *Miner v. N. Y., N. H. & H. Ry.*, 11 I. C. C. 422.

¹² *In re Advances in Rates, Western Case*, 20 I. C. C. 307.

sion is mistaken as to its jurisdiction, the courts will correct the error of law, and mandamus will lie to compel the Commission to exercise the jurisdiction with which it has been vested.¹³

§ 1138. Jurisdiction of the Federal courts.

The right of the Federal courts to review the orders and decisions of the Interstate Commerce Commission is derived from two sources. First, they have such jurisdiction as is expressly conferred by the Act to Regulate Interstate Commerce and its amendments. Second, they have such jurisdiction as is conferred upon them by the general judiciary acts of Congress. It was not intended by the Interstate Commerce Act to abbreviate the plenary jurisdiction of the Federal courts to entertain all controversies arising under an Act of Congress, either at law or equity, but the special remedies afforded by that Act were intended as merely supplementary to the ordinary remedies already existing under the Judicial Code. Although equitable jurisdiction over a particular controversy arising under the Interstate Commerce Act may not have been conferred upon the courts of the United States by the provisions of that Act, such courts may nevertheless entertain jurisdiction by virtue of the Judicial Code, which confers the powers of an equity court as to all cases and controversies arising under any act of Congress.^{13a} The Supreme Court had this distinction in mind when it said, "We are not required to say, however, that because an action at law for damages to recover unreasonable rates which have been exacted in accordance with the schedule of rates as filed, is forbidden by the Interstate Commerce Act, [see the Abilene Case, 204 U. S. 406] a suit in equity is also forbidden to prevent a filing or enforcement of a

¹³ *Interstate Commerce Commission v. Humboldt Steamship Co.*, 224 U. S. 474, 56 L. ed. 849, 32 Sup. Ct. 556.

^{13a} *Little Rock & M. Rd. Co. v. E. T., V. & G. Ry.*, 47 Fed. 771; *Tift v. Southern Ry.*, 123 Fed. 789.

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schedule of unreasonable rates or a change to unjust or unreasonable rates.”¹⁴ Hence if the remedies provided in the Act are inadequate, or are inapplicable, complainant may resort to the Federal courts under the provisions of the Judicial Code. And if the right which he seeks to enforce arises under the commerce clause, it is immaterial that it also exists at common law.¹⁵ Since suits under the commerce clause of the Constitution necessarily involve a Federal question, diversity of citizenship is not material to the maintenance of Federal jurisdiction.¹⁶ A suit to recover damages for acts which constitute a violation of the Interstate Commerce Act, the construction of which is in dispute between the parties, presents a Federal question for which it may, even if begun in a State court, be removed to a Federal court.¹⁷ The Judicial Code (sec. 24, par. 8) and the District Court Jurisdiction Act of Oct. 22, 1913, vest in the district courts of the United States original jurisdiction of all suits and proceedings arising under any law regulating commerce. If therefore a right conferred by a Federal statute is violated, recourse may be had to the district courts. Or if the Commission in the exercise of the power with which it is vested violates any right existing under the Federal Constitution, recourse may be had to the Federal courts for the amendment of its action. In this review of the orders of the Commission, the courts are concerned not with the expediency of the order but only with the power of the Commission to make it.

§ 1139. Constitutional and statutory limitations distinguished.

The problem which arises in all cases where the ques-

¹⁴ *Southern Ry. v. Tift*, 206 U. S. 428, 51 L. ed. 1124, 27 Sup. Ct. 709. See the same case in the lower court, 123 Fed. 789.

¹⁵ *Toledo, A. A. & N. M. Ry. v. Pennsylvania Co.*, 54 Fed. 730, 5 Int. Com. Rep. 522.

¹⁶ *Kentucky & Indiana Bridge Co. v. L. & N. Ry.*, 37 Fed. 567, 2 L. R. A. 289, 2 Int. Com. Rep. 351.

¹⁷ *Lowry v. C., B. & Q. Ry.*, 46 Fed. 83, 4 Int. Com. Rep. 435.

tion of the limits upon the jurisdiction of a commission is raised, is whether there is warrant of law for what is being done. To determine this is seldom as simple a matter as the reading of the statute under which the commission is purporting to act to see whether by proper interpretation sufficient authorization appears. If there is any doubt as to whether the power in question may constitutionally be conferred upon the commission, that question must be carefully considered. The action of a commission is fundamentally limited by these two possibilities—either that the legislature has not gone as far as it might in empowering the commission, or that the legislature has gone further than it constitutionally may in attempting to give the commission authority. This distinction between the constitutional limitations upon all administrative powers and the statutory limitations upon the particular commission is often obscured, but must necessarily be made in analyzing authorities. In dealing with the decisions of the Supreme Court of the United States on commission control of public utilities, it is particularly necessary to insist upon this distinction, so often is it ignored with such danger of confusing the principles of law involved. Fortunately the cases with which the United States Supreme Court has had to deal relating to the general matter under discussion may be divided with unusual facility into these two classes. The cases which come to the Supreme Court wherever complaint is made of illegal action by State commissions arise under the Fourteenth Amendment, and are therefore devoted to the constitutional limitations upon commission action; for the proper interpretation of a State statute is not a Federal question.¹⁸ On the other hand, the questions which come

¹⁸ See *Minneapolis & St. L. Ry. v. Minnesota*, 186 U. S. 257, 46 L. ed. 1161, 22 Sup. Ct. 901, and other similar cases elsewhere discussed, as for instance in § 238; but see the decisions handed down by the Supreme

Court on March 8, 1915 in the *North Dakota and West Virginia rate cases* to the effect that disproportionate rates arbitrarily fixed under a statute are in effect a denial of constitutional right.

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Court on March 8, 1915 in the North Dakota and West Virginia rate cases to the effect that disproportionate rates arbitrarily fixed under a statute are in effect a denial of constitutional right.

to the Supreme Court where the power of the Interstate Commerce Commission to act has been attacked have usually been questions involving the statutory limitations of the Interstate Commerce Act, although occasionally the constitutional limits upon congressional authorization have been brought in question. Recourse to the courts to settle these questions is itself governed by these principles. The vindication of the constitutional securities of those whose rights have been invaded cannot be withdrawn from the courts, nor can the power to say whether the coercion in question is without warrant of law. In the case of the Interstate Commerce Commission, Congress has left to the judgment of that body upon the facts before it about as much finality as is constitutionally possible.¹⁹ But examination of the facts which are material to the controversy is so indispensable in any justiciable question that the Federal courts often seem to be reviewing the discretion of the Commission as to facts, when they are in reality only keeping it within the laws.

B. Grounds of Invalidity of Commission Action

§ 1140. Action under an unconstitutional statute.

It is assumed in the Act that the Commission may make orders which should not be enforced, for it is expressly provided that "all orders of the Commission, except for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed by the Commission, unless the same shall be suspended or set aside by a court of competent jurisdiction." The grounds upon which the courts will exercise this right of review are determined in each case as it arises by the courts themselves.²⁰ The validity of the Act

¹⁹ See *Atchison, T. & S. F. Ry. v. U. S.*, 232 U. S. 199, 58 L. ed. 568, 34 Sup. Ct. 291, and other similar cases elsewhere discussed, for example in § 1036-1038 *passim* to the effect that

setting aside rates reasonable in themselves is not authorized by the Act properly interpreted.

²⁰ *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 38 L. ed.

as a whole is now too well settled to be questioned, but many of its provisions and several of the amendments have been attacked as an invasion of constitutional right. The Commission's interpretation of the Act and of its own powers under it have not infrequently been set aside by the courts, but in no case have they declared any part of the Act invalid because of conflict with the Constitution. The Acts under which the State commissions have been organized have not had an equally untroubled career. The legislatures of the several States are restrained not only by the provisions of their own constitutions, but their acts must also conform to the Federal Constitution and to the authority of Congress over commerce. The authority of Congress over interstate rates is exclusive, and any attempt by the States to regulate rates for interstate transportation is void. Hence a rate prescribed on carriage from a point within a State to a port in the same State from which the goods are to be sent to a point without the State is an interference with interstate commerce and is invalid.²¹ In many of the States a sentiment more hostile to carriers than has ever controlled Congress seemed to dominate the legislature, and this was manifested in some cases by fixing confiscatory rates and in others by attempting to exempt the orders of the commission from review by the courts. These provisions have always been set aside as being in violation of the Fourteenth Amendment. The jurisdiction of the State commissions is further limited by the existence of the Federal Act. The fact that Congress has exerted its power over interstate commerce deprives the States and their commissions of power to make many regulations which would otherwise be valid. A recent decision indicates that the control of the whole system of rates, both interstate and intrastate, may be

1014, 14 Sup. Ct. 1047. It is of course possible to provide by statute that a rate fixed by a commission shall be binding between the parties

until declared void by the courts.

²¹ Railroad Commission of Ohio v. Worthington, 225 U. S. 101, 56 L. ed. 1104, 32 Sup. Ct. 653.

assumed by the Federal Government if in its judgment this is necessary to the efficient regulation of interstate commerce.²² Even though Congress has not yet acted upon this principle, it has been held that a State commission may not so exert its authority as to interfere in any way with the authority confided to the Interstate Commerce Commission, and an interstate rate fixed by a State commission which operates to create a discrimination against a locality in interstate traffic may be set aside by the Interstate Commerce Commission.²³

§ 1141. Action not within the statute.

Granted that the Act in all its parts is constitutional, the Commission must find in it authority for whatever it does; and whether such authority exists is a question for the courts to determine. In an important case it was said by eminent counsel, "The Act is primarily an enumeration of particular duties imposed upon common carriers; of particular acts on their part which are prohibited; and of particular duties and powers relating thereto conferred upon the Commission."²⁴ In many cases acts of the Commission have been set aside because the requisite authority could not be found. In the main the courts compare the action of the Commission with the Act in the same way that they compare the action of Congress with the Constitution. Since the Act authorized it to declare rates unreasonable and prevent their enforcement, the Commission assumed that it was authorized to fix a reasonable rate, but prior to the amendment of 1906, its orders fixing rates were always declared invalid by the courts.²⁵ Likewise when the Commission ordered a

²² *Minnesota Rate Cases*, 230 U. S. 352, 57 L. ed. 1511, 33 Sup. Ct. 749.

²³ *Houston & Texas Ry. v. United States*, 234 U. S. 342, 34 Sup. Ct. 833, 58 L. ed. 1341.

²⁴ Brief of John C. Spooner and John G. Milburn in *Harriman v.*

Interstate Commerce Commission, 211 U. S. 407, 53 L. ed. 253, 29 Sup. Ct. 115.

²⁵ *Interstate Commerce Commission v. C., N. O. & T. P. Ry.*, 162 U. S. 184, 40 L. ed. 935, 16 Sup. Ct. 700, 13 U. S. Apps. 730, 56 Fed. 925,

through route established under authority of section 4 of the act of June 29, 1906, which, as it then stood, authorized it to require the establishment of such a route when no satisfactory through route existed, the court held that the Commission's decision as to the existence of a satisfactory through route was subject to review, and in this case it was reversed.²⁶ So also when the Commission, on petition of a carrier, ordered the establishment of switching connections, the courts pointed out that such an order could be made only on petition of a shipper, and held the Commission strictly to the letter of the Act.²⁷ Furthermore in determining whether an order of the Commission is within its power, the courts will look to the substance and not merely to the form. And so when the Commission prohibited an advance in rates, not, as shown by the record, because it was unjust and unreasonable, but because it would be beneficial to the business of the region affected to retain the lower rate, the court found that the Commission had no power to regulate and control the general policy of railroads as to fixing rates, but only the

4 I. C. C. Rep. 582, 4 I. C. C. 744; Interstate Commerce Commission v. C., N. O. & T. P. Ry., 167 U. S. 479, 42 L. ed. 243, 17 Sup. Ct. 896, 76 Fed. 1007, 76 Fed. 183, 64 Fed. 981, 62 Fed. 690, 6 I. C. C. 195; S. F. & W. Ry. v. Florida Fruit Exchange, 167 U. S. 512, 42 L. ed. 257, 17 Sup. Ct. 998, 4 I. C. Rep. 589, 4 I. C. Rep. 400, 5 I. C. C. 136, 5 I. C. C. 13; Interstate Commerce Commission v. L. S. & M. S. Ry., 202 U. S. 613, 50 L. ed. 1171, 26 Sup. Ct. 766, 134 Fed. 942, 9 I. C. C. 264; Interstate Commerce Commission v. Ala. Mid. Ry., 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. 45, 74 Fed. 715, 69 Fed. 227, 6 I. C. C. 1; Interstate Commerce Commission v. L. & N. Ry., 73 Fed. 409, 5 I. C. C. 466; Interstate Commerce Commission v. L. V. Ry., 82

Fed. 1002, 74 Fed. 784, 49 Fed. 177, 4 I. C. C. 535; Interstate Commerce Commission v. N. E. Ry. of S. C., 83 Fed. 611, 74 Fed. 70, 6 I. C. C. 295; Farmers' Loan & Trust Co. v. No. Pac. Ry., 83 Fed. 249, 5 I. C. C. 478; Colorado Fuel & Iron Co. v. So. Pac. Ry., 101 Fed. 779, 74 Fed. 42, 6 I. C. C. 488; Interstate Commerce Commission v. N. Y., R. & N. Ry., not reported, see 7th Annual Report of Interstate Commerce Commission, 29, 5 I. C. C. 161, 4 I. C. C. 488.

²⁶ Interstate Commerce Commission v. No. Pac. Ry., 216 U. S. 538, 54 L. ed. 608, 30 Sup. Ct. 155.

²⁷ Interstate Commerce Commission v. D., L. & W. Ry., 216 U. S. 531, 54 L. ed. 605, 30 Sup. Ct. 415.

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power to prevent unreasonable and discriminatory rates, and hence the order was set aside.²⁸ Likewise if the Commission attempts to exercise jurisdiction which it does not possess, as in the case of street car lines²⁹ or an intrastate road which issued no bills of lading beyond its own line,³⁰ or if through a mistaken construction of the Act it declines jurisdiction which it does possess,³¹ its error will be corrected by the courts. But in determining the meaning of a statute, the courts should look not only to its terms but to the history of its application. Hence, when the Commission has placed a construction upon some feature of the Act, which construction has long obtained in practical execution, and has been impliedly sanctioned by the reenactment of the Act without alteration in the particulars construed, such construction should be treated as read into the Act and should be followed in all strictly identical cases.³² Since all the authority of a commission is derived from the statute by which it was created, it follows that the repeal of the statute ipso facto terminates all proceedings pending before it, whatever may be the stage which they have reached.³³

§ 1142. Action in violation of constitutional guarantees.

It is recognized that the rate-making power necessarily implies a considerable range of legislative discretion, and as long as the legislative action is within its proper sphere, the courts are not entitled to interpose and upon their own investigation into traffic conditions and transportation problems to substitute their judgment with respect to the

²⁸ *Southern Pacific Ry. v. Interstate Commerce Commission*, 219 U. S. 433, 55 L. ed. 283, 31 Sup. Ct. 288.

²⁹ *Omaha & Council Bluffs Street Ry. v. Interstate Commerce Commission*, 230 U. S. 324, 57 L. ed. 1501, 33 Sup. Ct. 890.

³⁰ *Interstate Commerce Commission v. B. Z. & C. Ry.*, 77 Fed. 942.

³¹ *Interstate Commerce Commission v. Humboldt Steamship Co.*, 224 U. S. 474, 56 L. ed. 849, 32 Sup. Ct. 556.

³² *New York, N. H. & H. Ry. v. Int. Com. Comm.*, 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. 272.

³³ *Grand Trunk Ry. v. County Commissioners*, 88 Me. 225, 33 Atl. 988.

reasonableness of rates for that of the legislature or of a Federal or State commission acting within the range of its delegated power.³⁴ Granted that the statute under which a commission is acting is constitutional, and that the commission is vested with the power which it has exercised, the question still remains as to whether it has so used its powers as to violate any constitutional right. This question is particularly important in connection with the fixing of rates. It is now well established that this is a function which may be delegated to a commission, but if this is done the power must be so used as not to conflict with the Fifth and Fourteenth Amendments. While the commissions, both Federal and State, are expected to exercise their rate-making powers to protect the interests of the public, they must also have regard to the property rights of the carrier. They are not at liberty to prescribe rates that will not allow the carrier to earn such compensation for the services rendered as, under all the circumstances, is just and reasonable both to it and to the public, for that would deprive the carrier of its property without due process of law, and would be taking its property for public use without just compensation. Every rate schedule fixed by a commission is therefore open to review in the courts for the purpose of ascertaining whether the rates fixed are confiscatory and whether the carrier's constitutional rights have been violated,³⁵ and any statute which attempted to prevent such judicial action would be void.³⁶ It should be noted, however, that the carrier can complain of the order of the commission only in so far as it affects its own revenues. Its effect on shippers or on localities is immaterial to the carrier, since a court will hear a party only with reference to his own grievances.³⁷

³⁴ *Louisville & Nashville Ry. v. state Commerce Commission*, 164 Garrett, 231 U. S. 298, 58 L. ed. 229, 34 Sup. Ct. 48. Fed. 645.

³⁵ *Lehigh Valley Ry. v. United state Commerce Commission*, 194 States, 204 Fed. 986. Fed. 449.

³⁶ *Missouri, K. & T. Ry. v. Inter-*

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Neither will the courts interfere with a rate fixed by the Commission when its effect is to entail a loss of traffic by other roads,³⁸ nor will they interfere with such a rate unless convinced that its enforcement will result in a loss of revenue.³⁹ A State may do more than authorize its courts to review judicially the rate-making orders of its commission. It may go farther and in connection with such review it may empower its judicial tribunals to act as a rate-making body and themselves fix a schedule of rates.⁴⁰ But the Fourteenth Amendment does not entitle the carrier to the exercise by the courts of such extra-judicial authority,⁴¹ and the Federal courts have not been given any such authority.⁴²

§ 1143. Action after an inadequate hearing.

The Commission as a quasi-judicial body is vested with many of the powers of a court. It may summon parties before it, may compel the production of papers and the giving of testimony, and may make orders which have the force of law. It is likewise subject to many of the obligations and restraints which rest upon a court. If it may summon parties before it and issue orders which may deprive them of property and in certain respects control their conduct, the parties so affected must have an opportunity to be heard. There are few cases in which this question has directly arisen, but in all of them it is distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied, or if that which was granted was inadequate or unfair. But if the

³⁸ *Norfolk & Western Ry. v. United States*, 195 Fed. 953.

³⁹ *Central of Georgia Ry. v. Mc-Lendon*, 157 Fed. 961. That the rate violates the constitutional rights of the carrier must be clear in order to justify the interference of the courts. *Eagle White Lead Co. v. Interstate Commerce Commission*, 188 Fed. 256.

⁴⁰ *Prentiss v. Atlantic Coast Line Ry.*, 211 U. S. 210, 53 L. ed. 150, 29 Sup. Ct. 67.

⁴¹ *Louisville & Nashville Ry. v. Garrett*, 231 U. S. 298, 58 L. ed. 229, 34 Sup. Ct. 48.

⁴² *Mitchell Coal Co. v. Penn. Ry.*, 230 U. S. 247, 57 L. ed. 1472, 30 Sup. Ct. 916.

defendant has notice of the character of the order asked for and an opportunity to show that it would be unreasonable to grant it, it has not been deprived of its right to a hearing.⁴³ All this is involved in our notion of due process of law. Whether the circumstances of the exercise of the power to give orders are such as conduce to justice may therefore be the subject of inquiry by the courts. This can always be done, as the questions raised are in a true sense justiciable. Whether the order deprives the carrier of a constitutional or statutory right, and whether the hearing was adequate and fair, are all matters within the scope of the judicial power. In the comparatively few cases in which such questions have arisen it has been pointed out that it has invariably been recognized that administrative orders quasi-judicial in character are void—(1) if a hearing was denied; (2) if although granted it was inadequate or manifestly unfair; (3) if the finding was contrary to the indisputable character of the evidence; (4) or if the facts found do not as a matter of law support the order made.⁴⁴

§ 1144. Action upon mistaken conclusions of law.

Congress has made the Commission's findings *prima facie* true, which is as far as it can constitutionally go towards making them conclusive. The Commission's findings of fact are often so intermixed with questions of law that an examination and even a construction of the facts may be necessary in order to keep the Commission within its powers. This necessitates an examination of the evidence, not for the purpose of reconciling conflicts of testimony or of deciding upon pure questions of fact, but only

⁴³ *Oregon Ry. & N. Co. v. Fairchild*, 224 U. S. 510, 56 L. ed. 863, 32 Sup. Ct. 535.

See also *United States v. Baltimore & O. S. W. Ry.*, 226 U. S. 14, 57 L. ed. 104, 33 Sup. Ct. 5, discussed in the next section.

⁴⁴ *Atlantic C. L. Ry. v. Interstate Commerce Commission*, 194 Fed. 449.

See also *Interstate Commerce Commission v. Louisville & N. Ry.*, 227 U. S. 88, 57 L. ed. 431, 33 Sup. Ct. 185, discussed in the next section.

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to determine whether what purports to be a finding of fact is so involved with questions of law as to be in substance and effect a decision of the latter.⁴⁵ The conclusions of the Commission are also subject to review if it has excluded facts and circumstances that ought to have been considered.⁴⁶ Even when the facts are not disputed, the Commission's power to make the order in question is open to review, and if not warranted by law its order may be enjoined.⁴⁷ In the exercise of this function of review the courts have reversed many orders of the Commission because of erroneous conclusions of law. Before the long-and-short haul clause was amended in 1910, the Commission at first did not recognize the existence of competition as a difference in circumstance and condition which justified a difference in rates, and on this point it was frequently reversed by the courts.⁴⁸ On the following ques-

⁴⁵ *Kansas City Ry. v. Albers Commission Co.*, 223 U. S. 573, 56 L. ed. 556, 32 Sup. Ct. 316.

⁴⁶ *Cincinnati, N. O. & T. P. Ry. v. Interstate Commerce Commission*, 162 U. S. 184, 40 L. ed. 935, 16 Sup. Ct. 700; *Texas & Pacific Ry. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. ed. 940, 16 Sup. Ct. 666; *Interstate Commerce Commission v. Alabama Mid. Ry.*, 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. 45; *Louisville & N. Ry. v. Behlmer*, 175 U. S. 648, 44 L. ed. 309, 20 Sup. Ct. 209; *Illinois Cent. Ry. v. Interstate Commerce Commission*, 206 U. S. 441, 51 L. ed. 1127, 27 Sup. Ct. 700.

⁴⁷ *Interstate Commerce Commission v. B. & O. Ry.*, 225 U. S. 326, 56 L. ed. 1107, 32 Sup. Ct. 742; *Stickney v. Interstate Commerce Commission*, 164 Fed. 638.

⁴⁸ *Interstate Commerce Commission v. A., T. & S. F. Ry.*, 149 U. S. 264, 37 L. ed. 727, 13 Sup. Ct. 837, 50 Fed. 295, 4 I. C. C. 104; *Texas*

& Pacific Ry. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 16 Sup. Ct. 666, 57 Fed. 948, 52 Fed. 187, 4 I. C. C. Rep. 62, 4 I. C. C. 447; *Interstate Commerce Commission v. Clyde Steamship Co.*, 181 U. S. 29, 45 L. ed. 729, 21 Sup. Ct. 512, 93 Fed. 83, 88 Fed. 186, 5 I. C. C. 324; *East Tennessee, V. & G. Ry. v. Interstate Commerce Commission*, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. 512, 99 Fed. 52, 85 Fed. 107, 5 I. C. C. 546; *Interstate Commerce Commission v. Ala. Mid. Ry.*, 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. 45, 74 Fed. 715, 69 Fed. 227, 6 I. C. C. 1; *Louisville & N. Ry. v. Behlmer*, 175 U. S. 648, 44 L. ed. 309, 20 Sup. Ct. 209, 83 Fed. 898, 71 Fed. 835, 6 I. C. C. 257; *Interstate Commerce Commission v. So. Ry.*, 105 Fed. 703, 6 I. C. C. 588; *Brewer & Hanleiter v. C. of Ga. Ry.*, 84 Fed. 258, 7 I. C. C. 224; *Interstate Commerce Commission v. L. & N. Ry.*, 190 U. S. 273, 47 L. ed. 1047, 23 Sup. Ct. 687, 108 Fed. 988, 101 Fed. 146, 102 Fed. 709, 7 I. C. C.

tions of law and fact the decisions of the Commission were overruled, the courts holding that a bridge is not a common carrier;⁴⁹ that competition is to be considered in fixing rates under section 3;⁵⁰ that party rates are not discriminatory;⁵¹ that the granting of free cartage at a terminal is not a rebate;⁵² nor a violation of the long-and-short-haul clause;⁵³ that there is no discrimination against shippers if they are not offered a facility for which they have never asked;⁵⁴ that the value of an article should be considered in determining the rate to be paid;⁵⁵ that a switching charge which is reasonable in itself cannot be condemned because when added to the through charge the whole is unreasonable;⁵⁶ that an elevator allowance paid to a shipper for treatment of his own grain at his own elevator is not a rebate;⁵⁷ that a carrier may charge different rates on a commodity at different seasons of the year;⁵⁸

431; *Interstate Commerce Commission v. So. Ry.*, 122 Fed. 800, 117 Fed. 741, 8 I. C. C. 571, 8 I. C. C. 409; *Interstate Commerce Commission v. So. Pac. Ry.*, Circuit Court, California (not reported), 8 I. C. C. 481; *Interstate Commerce Commission v. N. C. & St. L. Ry.*, 120 Fed. 934, 8 I. C. C. 503; *Interstate Commerce Commission v. C. P. & V. Ry.*, 124 Fed. 624, 9 I. C. C. 118.

⁴⁹ *Kentucky & Indiana Bridge Co. v. L. & N. Ry.*, 37 Fed. 567, 2 I. C. C. 193, 2 I. C. C. 162.

⁵⁰ *Interstate Commerce Commission v. C. G. W. Ry.*, 209 U. S. 108, 52 L. ed. 705, 28 Sup. Ct. 493.

⁵¹ *Interstate Commerce Commission v. B. & O. Ry.*, 145 U. S. 263, 40 L. ed. 699, 12 Sup. Ct. 844, 43 Fed. 37, 3 I. C. C. 465.

⁵² *Interstate Commerce Commission v. D., G. H. & M. Ry.*, 167 U. S. 633, 42 L. ed. 306, 17 Sup. Ct. 986, 57 Fed. 1005, 3 I. C. C. 613.

⁵³ *Interstate Commerce Commis-*

sion v. A., T. & S. F. Ry., 149 U. S. 264, 37 L. ed. 727, 13 Sup. Ct. 837, 50 Fed. 295, 4 I. C. C. 104.

⁵⁴ *Penn Refining Co. v. W. N. Y. & P. Ry.*, 208 U. S. 208, 52 L. ed. 456, 28 Sup. Ct. 268, 137 Fed. 343, 82 Fed. 192, 6 I. C. C. 449, 6 I. C. C. 378, 6 I. C. C. 52, 5 I. C. C. 415.

⁵⁵ *Interstate Commerce Commission v. D., L. & W. Ry.*, 64 Fed. 723, 6 I. C. C. 148.

⁵⁶ *Interstate Commerce Commission v. Stickney*, 215 U. S. 98, 54 L. ed. 112, 30 Sup. Ct. 66, 164 Fed. 638, 12 I. C. C. 507, 12 I. C. C. 6, 11 I. C. C. 277, 10 I. C. C. 83.

⁵⁷ *Interstate Commerce Commission v. Diffenbaugh, Union Pac. Ry. v. Peavey*, 222 U. S. 42, 56 L. ed. 83, 32 Sup. Ct. 22, 176 Fed. 409, 14 I. C. C. 551, 14 I. C. C. 510, 14 I. C. C. 317, 14 I. C. C. 315, 13 I. C. C. 498, 12 I. C. C. 85, 10 I. C. C. 309.

⁵⁸ *Interstate Commerce Commission v. L. & N. Ry.*, 73 Fed. 409, 5 I. C. C. 466.

that a carrier is entitled to a reasonable profit on any extra service which it performs;⁵⁹ that the reservation of the right of routing to the initial carrier is not prohibited by the Act;⁶⁰ that a shipper is not legally entitled to ship on a local rate to one point and thence reship on a local rate to another point when the through rate is greater than the combination of the locals;⁶¹ that the Commission cannot compel by injunction the filing of reports that it has not asked for;⁶² that payment of a lighterage allowance on a shipper's own goods for the use of shipper's terminal was not discriminatory;⁶³ that a traction company is not a lateral branch line of a railway within the meaning of section 15;⁶⁴ that tap lines are common carriers;⁶⁵ and that an existing through route is not unsatisfactory simply because many travellers prefer another one.⁶⁶

§ 1145. Action contrary to evidence.

The Commission's conclusions of fact are accepted as final provided there is substantial evidence to support them. Evidence is as necessary to the discharge of the Commission's quasi-judicial functions as is a hearing, and a finding without evidence to support it is arbitrary and

⁵⁹ *Southern Ry. v. St. Louis Hay & Grain Co.*, 214 U. S. 297, 53 L. ed. 1004, 27 Sup. Ct. 678, 153 Fed. 728, 149 Fed. 609, 11 I. C. C. 90.

⁶⁰ *Southern Pacific Ry. v. Interstate Commerce Commission*, 200 U. S. 536, 50 L. ed. 585, 26 Sup. Ct. 330, 137 Fed. 606, 132 Fed. 829, 123 Fed. 597, 9 I. C. C. 182.

⁶¹ *Hope Cotton Oil Co. v. T. & P. Ry.*, not reported, see 20th Ann. Rep. of I. C. C. 46, 10 I. C. C. 696.

⁶² *United States v. Union Stockyards*, 226 U. S. 286, 57 L. ed. 226, 33 Sup. Ct. 83, 192 Fed. 348, 192 Fed. 330, 1 Com. Ct. 189, 225; *Ex parte Docket No. 25*.

⁶³ *United States v. B. & O. Ry.*, 231 U. S. 274, 56 L. ed. 1107, 34 Sup. Ct.

75, 200 Fed. 779, Commerce Court, No. 38, 20 I. C. C. 200, 17 I. C. C. 40.

⁶⁴ *United States v. B. & O. S. W. Ry.*, 226 U. S. 14, 57 L. ed. 104, 33 Sup. Ct. 5, Commerce Court, No. 60, 195 Fed. 962, 20 I. C. C. 486.

⁶⁵ *Tap Line Cases*, 234 U. S. 1, 58 L. ed. 1185, 34 Sup. Ct. 741, 209 Fed. 224, 23 I. C. C. 549, 23 I. C. C. 277, 234 U. S. 29, 34 Sup. Ct. 741, 58 L. ed. 1185, 34 Sup. Ct. 741, 209 Fed. 260, 23 I. C. C. 549, 23 I. C. C. 277.

⁶⁶ *Interstate Commerce Commission v. No. Pac. Ry.*, 216 U. S. 538, 54 L. ed. 608, 30 Sup. Ct. 155, Circuit Court not reported, see 23d Annual Report of Interstate Commerce Commission, 37, 16 I. C. C. 300.

void.⁶⁷ Hence when it is contended that an order the enforcement of which is resisted was rendered without any evidence whatever to support it, the consideration of such a question involves not an issue of fact, but one of law which it is the duty of the courts to examine and decide.⁶⁸ This may be done in a suit for damages on an order of the Commission awarding reparation.⁶⁹ It is not enough for the Commission to say that its order is based on its own investigation independent of the testimony of witnesses.⁷⁰ "Such an investigation is quite different from a view by a jury taken with notice and subject to the order of a court, and different again from the question of the right of the Commission to take notice of results reached by it in other cases, when its doing so is made to appear in the record and the facts thus noticed are specified so that matters of law are saved."⁷¹ In reviewing an order of a State commission directing a carrier to make track connections with another carrier, the court said, "Here there is no evidence of inadequate service, no proof of public complaint or of a public demand, and no testimony that any freight had been offered in the past for shipment between the points named, or that any such freight would be offered in the future; nor was there any evidence whatever as to the volume of freight that would use these tracks or that the saving in freight and time to the shipper would justify the admitted expense to the carrier, whether that expense be \$7,500, as found by the Commission, or \$21,000, as claimed by the carrier."⁷² Under the Act to Regulate Commerce, however, a suit in the Federal courts to enjoin

⁶⁷ *Interstate Commerce Commission v. L. & N. Ry.*, 227 U. S. 88, 57 L. ed. 431, 33 Sup. Ct. 185.

⁶⁸ *Florida East Coast Line v. United States*, 234 U. S. 167, 58 L. ed. 1267, 34 Sup. Ct. 867; *Louisville & Nashville Ry. v. Finn*, 235 U. S. 601, 35 Sup. Ct. 146.

⁶⁹ *Atlantic Coast Line v. Interstate Commerce Commission*, 194 Fed. 449.

⁷⁰ *Oregon R. R. & N. Co. v. Fairchild*, 224 U. S. 510, 56 L. ed. 863, 32 Sup. Ct. 535.

⁷¹ Justice Holmes in *United States v. B. & O. Southwestern Ry.*, 226 U. S. 14, 20, 57 L. ed. 104, 33 Sup. Ct. 5.

⁷² *Oregon R. R. & N. Co. v. Fairchild*, 224 U. S. 510, 531, 56 L. ed. 863, 32 Sup. Ct. 535.

an order of the Interstate Commerce Commission fixing charges is not confined to an ascertainment of what was determined by the Commission and to a consideration of the sufficiency of the facts as determined by it to sustain the order; but on the contrary the hearing may be *de novo*, and may include the taking and consideration of evidence other than that before the Commission.⁷³

§ 1146. Limitation to evidence in the record.

This means that in order to have what may pass as due process of law there cannot be substantial disregard of our ancient traditions. The Commission is not justified in condemning rates and making revisions upon mere impressions and comparisons, but may act only upon facts and conditions duly established. In this light the right to a hearing which the Act provides must be fully protected. Manifestly there is no hearing in any true sense unless the party knows what evidence is offered or considered, and is given opportunity to explain and refute it. This is not merely a matter of proper construction of the Act, it is a right which comes from the Constitution itself. Even though it be recognized that the Commission is a body of experts, it may not condemn a rate as unreasonable merely upon the knowledge and accumulated experience of its members, but may do so only upon a full hearing giving opportunity to the carrier to be heard. This argument was brought out fully in the Supreme Court recently where the contention was made that the findings and orders of the Commission under section 15 might be originally supported and subsequently defended by information which the Commission had gathered under section 12 for general purposes. But the Supreme Court would have none of this where the rights of parties were involved. When the point was raised apparently for the first time in *United States v. Baltimore & Ohio South-*

⁷³ *Missouri, K. & T. Ry. Co. v. Interstate Commerce Commission*, 164 Fed. 645.

western Railroad,⁷⁴ there was no question about the attitude of the Supreme Court. The Supreme Court is now plainly insistent that all parties before the Commission in any proceedings directed against them must be fully apprised of the evidence submitted or to be considered and must be given opportunity to cross-examine witnesses and to inspect documents and to offer evidence in explanation and rebuttal. In no other way consistently with what we consider due course of the administration of justice can a party maintain its rights or make out its defense. Moreover, as the Supreme Court has keenly appreciated, in no other way can the courts inquire as to the existence of evidence upon which the finding might be based; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown, but presumptively sufficient, information to support the finding.

§ 1147. Conclusiveness of Commission findings.

If, however, the Commission's conclusion is supported by evidence it is final. The evidence must be substantial; the public interests involved are so many and so vast that a mere scintilla of proof is not enough.⁷⁵ Where there is a very considerable mass of testimony, which, if believed

⁷⁴ 226 U. S. 14, 57 L. ed. 104, 33 Sup. Ct. 5.

In a petition to the Circuit Court to enforce an order of the Commission before the judge sitting without a jury, the full report of the Commission, containing a commingled statement of opinion drawn from the facts and of conclusions of law, as well as of the facts themselves, was admitted in evidence, complainant stating to the court the nature of said report and offering it in evidence in so far as the facts therein contained were material or competent.

The court held the admission of said report was not prejudicial on the ground that it included the extraneous opinions and conclusions of the Commission. *Chicago, B. & Q. R. R. Co. v. Feintuch*, 191 Fed. 482.

⁷⁵ *Interstate Commerce Commission v. Un. Pac. Ry.*, 222 U. S. 541, 56 L. ed. 308, 32 Sup. Ct. 108; *Louisville & N. Ry. v. Interstate Commerce Commission*, 195 Fed. 541; *L. & P. Ry. v. United States*, 209 Fed. 242.

by the Commission, would justify it in finding a rate unreasonable and it appears that it has based its decision on such testimony, the condition precedent to the exercise of its power to fix reasonable rates has been met.⁷⁶ In a coal rate case there was evidence before the Commission as to cost of transportation, operating expenses, interest, depreciation, other rates for transporting coal, markets, allowances, terminal expenses and the life of the carrier and other conditions. On appeal the court held that the order reducing rates could not be declared invalid on the ground of lack of evidence.⁷⁷ It is not for the courts to say whether the Commission has properly attached great or little weight to evidence adduced upon a given point or whether the conclusion reached by the Commission upon testimony as to facts alone shows a mistake as to some particular fact not essential or vital to the proceeding, or an inadvertency, or is not such a conclusion as the courts might have reached. If the particular matter in issue and inquired into was one of fact and a full hearing was afforded and the conclusion reached is supported by substantial evidence, it will not be nullified by the courts.⁷⁸ Whether the Commission gives much or little weight to a particular piece of evidence or regards it as controlling in arriving at a result is immaterial,⁷⁹ since this is a question of fact and not of law.⁸⁰ But the legal effect of evidence is a question of law. The Commission, even when acting in its quasi-judicial capacity, is not limited by the strict rules as to the admissibility of evidence which prevail in suits between private parties.⁸¹ But the more liberal the practice

⁷⁶ *Atchison, T. & S. F. Ry. v. United States*, 203 Fed. 56.

⁷⁷ *Lehigh Valley Ry. v. United States*, 204 Fed. 986.

⁷⁸ *Norfolk & Western Ry. v. United States*, 195 Fed. 953.

⁷⁹ *Louisville & N. Ry. v. Interstate Commerce Commission*, 184 Fed. 118, 195 Fed. 541; *Lehigh Valley*

Ry. v. United States, 204 Fed. 986.

⁸⁰ *Illinois Central Ry. v. Interstate Commerce Commission*, 206 U. S. 441, 466, 51 L. ed. 1128, 27 Sup. Ct. 700.

⁸¹ *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 48 L. ed. 860, 24 Sup. Ct. 563.

as to the introduction of testimony, the more imperative it is that the essential rules of evidence by which these rights are asserted or defended should be preserved.⁸²

Topic C. Procedure for Determining Validity of Commission Action

§ 1148. Temporary restraining orders.

Should any person affected by an order of the Commission be convinced that such order should be set aside, annulled or suspended, in whole or in part, he may invoke the jurisdiction of the district court by filing in the office of the clerk of that court a written petition setting forth briefly and succinctly the facts constituting the petitioner's cause of action, and specifying the relief sought. The pendency of such suit shall not of itself stay or suspend the operation of the order of the Commission, but the court may, in its discretion, restrain or suspend, in whole or in part, the operation of the Commission's order pending the final hearing and determination of the suit. It is clear that injunction orders may be issued upon application to the district courts in three forms: First, a temporary restraining order staying in whole or in part the operation of the order of the Commission for not more than sixty days, to be allowed by a majority of three judges; second, a preliminary injunction to restrain or suspend in whole or in part the operation of the Commission's order, *pendente lite*, to be allowed by a majority of three judges; third, in the nature of things, a perpetual injunction upon the entry of the final decree.⁸³ As to the first of these forms of equitable relief, the Act provides that where irreparable damage would otherwise ensue to the petitioner, application may be made to the district court and shall be heard by three judges, at least one of whom shall be a circuit judge. If a majority of the three judges

⁸² *Interstate Commerce Commission v. L. & N. Ry.*, 227 U. S. 88, 57 L. ed. 431, 33 Sup. Ct. 185.

⁸³ *United States v. B. & O. Ry.*, 225 U. S. 306, 56 L. ed. 1107, 32 Sup. Ct. 742.

concur, they may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or in part, of the operation of the order of the Interstate Commerce Commission for not more than sixty days.

§ 1149. Injunction against enforcement.

No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application is presented to a judge, he shall immediately call two other judges to his assistance to hear and determine the application. This application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and to such other persons as may be defendants in the suit. The judges may, at the time of hearing an application for a temporary restraining order, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application.⁸⁴ The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited

⁸⁴ In interpreting almost identical language in the Act creating the Commerce Court, the Supreme Court held that the requirement as to a finding based upon evidence identified by reference thereto applied only to

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and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. Upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of the Commission, the same requirements as to judges and as to the expedition of the suit shall apply. In passing upon such petitions which include the report or opinion of the Commission, the court is limited to examining the report or opinion of the majority of the Commission, and the views of the minority are not open to consideration.⁸⁵

§ 1150. Balance of equities.

In a suit in equity to enjoin the action of the Commission, the court starts with the presumption that the order is valid, and the burden of showing that the facts are such as to render the order invalid rests upon the carrier assailing it, and unless the case made on behalf of the carrier is a clear one the order ought to be upheld.⁸⁶ In determining whether it should temporarily enjoin a proposed increase of interstate rates the court must take into account the balance of equities between the shippers and the carriers. If the balance of detriment or inconvenience in the event the temporary injunction is refused is against the shippers, then the injunction will be granted. But if, on the other hand, the balance of detriment or inconvenience is against the carrier, in the event the temporary injunction should be issued, then it should be refused.⁸⁷ The Supreme Court of the United States will not on appeal reverse an order of preliminary injunction of an inferior Federal court to restrain an order of the Commission forbidding carriers to make certain allowances, except where there has been an abuse of discretion by the inferior court,

⁸⁵ *Atchison, T. & S. F. Ry. v. Interstate Commerce Commission*, 188 Fed. 229; *Southern Pacific Ry. v. Interstate Commerce Commission*, 188 Fed. 241.

⁸⁶ *Mo., K. & T. Ry. v. Interstate*

Commerce Commission, 164 Fed. 645.

⁸⁷ *Arlington Heights Fruit Co. v. So. Pac. Ry.*, 175 Fed. 141; *Nashville Grain Exchange v. United States*, 191 Fed. 37.

or where it plainly appears that the preliminary order was in effect a decision by the inferior court of the whole controversy on its merits, or when it is demonstrable that grave detriment to the public interest will result from a failure of the Supreme Court finally to dispose of the controversy without remanding the case.⁸⁸ On appeal from the order of an inferior court enjoining an order of the Commission, the Supreme Court reviews the findings of the Commission.⁸⁹

§ 1151. Appeal from the district court on petitions for injunctions.

An appeal may be taken direct to the Supreme Court of the United States from the order of the district court granting or denying, after notice and hearing, an interlocutory injunction in such case, if such appeal be taken within thirty days after the order in respect to which the complaint is made is granted or refused, and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of the Commission, the same requirements as to appeals shall apply. A final judgment or decree of the district court may be reviewed by the Supreme Court if appeal thereto be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. And in such case the notice required shall be served upon the defendants in the case. It was formerly within the power of the Circuit Court to suspend its decree requiring a carrier to desist from violating the Act, pending an appeal from such decree, until a decision should be made by the appellate court. It was said that this power should

⁸⁸ *United States v. B. & O. Ry.*, 225 U. S. 306, 56 L. ed. 1100, 32 Sup. Ct. 817.

⁸⁹ *Interstate Commerce Commission v. D., L. & W. Ry.*, 216 U. S. 531, 30 Sup. Ct. 417; *Interstate Commerce*

Commission v. No. Pac. Ry., 216 U. S. 538, 30 Sup. Ct. 415; *Kentucky Bridge Co. v. L. & N. Ry.*, 37 Fed. 567; *Mo., K. & T. Ry. v. Interstate Commerce Commission*, 164 Fed. 645.

always be exercised whenever irreparable injury may result by continuing the decree in effect as rendered.⁹⁰ And this provision was said not to be inconsistent with the policy expressed in the Expediting Act.⁹¹

§ 1152. Sufficiency of averments.

If a petition is brought for the restraining or annulment of an order of the Commission, it must set forth facts which if true would sustain the petitioner's contention. This is particularly necessary in cases where it is claimed that the Commission's order is confiscatory. In such a case, a demurrer will be sustained where the bill merely charges in general terms that the rates prescribed are not reasonably compensatory and do not yield a reasonable profit, as it is the duty of the carriers, having, as they do, largely in their possession the means of information, to set out the revenue derived, the cost of service, the amount of revenue necessary for the maintenance of the petitioners as common carriers, to what extent such revenue would be affected by the rates prescribed in the order complained of, and other facts showing confiscation.⁹² So also general allegations in a bill attacking an order fixing maximum freight rates which state in substance the judgment of the pleader as to what the evidence before the Commission did not "tend to establish," are insufficient to justify a court in enjoining the enforcement of the order upon the ground that the Commission had either denied the hearing contemplated by the Act, or, by its arbitrary action, had been guilty of an abuse of power, nor is the allegation that losses in revenue will result sufficient to establish confiscation without any showing as to the value of the property employed, the expense of operation, or the return which will be permitted under the rates prescribed.⁹³

⁹⁰ *Interstate Commerce Commission v. Louisville & N. R. R.*, 101 Fed. 146.

⁹¹ *Interstate Commerce Commission v. Southern Pac. Co.*, 137 Fed. 606.

⁹² *Atlantic Coast Line v. Interstate Commerce Commission*, 194 Fed. 449.

⁹³ *Louisville & Nashville Ry. v. Garrett*, 231 U. S. 298, 58 L. ed. 229,

§ 1153. Necessary and proper parties.

Under the Interstate Commerce Act suits in the courts to enjoin, set aside, annul or suspend an order of the Commission may be maintained not only by those who were parties to the complaint before the Commission but by anyone who is affected by the Commission's order. Nor is it necessary that all the parties to the complaint should be joined. This arises from the fact that the petition in the courts is not an appeal or writ of error, but it is a plenary suit in equity and may be brought by one party without joining the other parties to the order.⁹⁴ The determination of the question as to what parties may maintain such suits is left by the Act to the general rules and practices in equity, and under them any party whose rights or property are in danger of irreparable injury from an unauthorized order of the Commission may appeal to a Federal court of equity for relief.⁹⁵ Hence when carriers are not made party defendants to a complaint before the Commission, but the order of the Commission reducing rates will inevitably require reductions by such carriers in large amounts from the fact that they are largely engaged in the transportation affected by such order, they have a sufficient interest to entitle them to join in a petition to the Federal court to enjoin said order. Likewise the courts may at their discretion permit the parties to any complaint before the Commission to intervene as defendants in a suit to enjoin an order of the Commission, where such intervention does not delay the progress of the suit.⁹⁶

34 Sup. Ct. 48. So a rate on a particular product will not be set aside when the carrier offers no evidence as to its receipts or the value of its property affected by the order. *Wood v. Vandalia Ry.*, 231 U. S. 1, 58 L. ed. 97, 32 Sup. Ct. 7, nor when the lower court ascertained the value by an unreliable method. *Minnesota Rate Cases*, 230 U. S. 352, 57 L. ed.

1511, 33 Sup. Ct. 729; *Missouri Rate Cases*, 230 U. S. 474, 57 L. ed. 1571, 30 Sup. Ct. 975.

⁹⁴ *Atlantic Coast Line v. Interstate Commerce Commission*, 194 Fed. 449.

⁹⁵ *Peavey & Co. v. Union Pacific Ry.*, 176 Fed. 409.

⁹⁶ *Delaware, L. & W. Ry. v. Interstate Commerce Commission*, 169 Fed. 894.

§§ 1154, 1155] RAILROAD RATE REGULATION

§ 1154. Venue of enforcement suits.

The District Court Jurisdiction Act of 1913 provides that the venue of any suit brought to enforce, suspend, or set aside, in whole or in part, any order of the Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that when the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the Commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the Commission, the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. Where one of two carriers which have established a joint rate is within the jurisdiction of the court, an order of the Commission affecting such rate may be enforced as against that carrier, although the other carrier is without the jurisdiction of the court, and cannot, on that account, be made a party.⁹⁷

§ 1155. Introduction of new evidence.

Since the proceedings in equity either for restraining, annulling, or enforcing an order of the Commission are *de novo*, the parties are not restricted to the evidence upon which the Commission based its finding, but may introduce new evidence.⁹⁸ The Supreme Court, however, has severely condemned the practice of willfully withholding essential evidence from the Commission and first introducing it in proceedings in court. "The Commission is an administrative board. . . . The theory of the Act evidently is, as shown by the provision that the findings of the Commission shall be regarded as *prima facie* evidence, that

⁹⁷ Interstate Commerce Commission v. T. & P. Ry., 52 Fed. 187; affirmed, 57 Fed. 948, 6 C. C. A. 653.

⁹⁸ Mo., K. & T. Ry. v. Interstate Commerce Commission, 164 Fed. 645.

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the facts of the case are to be disclosed before the Commission. We do not mean, of course, that either party, in a trial in the court, is to be restricted to the evidence that was before the Commission, but that the purposes of the Act call for a full inquiry by the Commission into all the circumstances and conditions pertinent to the questions involved." ⁹⁹ But it is competent for the legislature to provide that if the party affected had a right to introduce all material evidence at the hearing before the Commission no new evidence shall be introduced on review in the courts. In such case the Commission acts like a master in chancery. It takes testimony and makes findings, and the court tests their correctness by reviewing the evidence upon which they were based.¹ Even without such legislation the court in a recent case held that if the carrier wished to introduce additional evidence as to whether a rate was confiscatory it should apply to the Commission for a rehearing, and unless it appeared that the Commission had excluded evidence that was material, the court would review the order only on the testimony that was before the Commission.²

Topic D. Enforcement Proceedings in the Courts

§ 1156. Functions of the Commission in the enforcement of the Act.

The Act imposes upon the Commission many duties and authorizes it to exercise many powers without however providing the Commission itself with the necessary machinery. In such cases the Act provides that the Commission may resort to the courts for assistance. The Act expressly states, "The Commission is hereby authorized and required to execute and enforce the provisions of this

⁹⁹ Cincinnati, N. O. & T. P. Ry. v. Interstate Commerce Commission, 162 U. S. 184, 196, 40 L. ed. 935, 27 Sup. Ct. 948.

¹ Oregon R. R. & N. Co. v. Fair-

child, 224 U. S. 510, 56 L. ed. 863, 32 Sup. Ct. 535.

² Louisville & Nashville Ry. v. United States, 218 Fed. 89.

Act. The law is made void by judicial process. Should a carrier violate or fail to comply with any of the provisions of the Act, the district courts upon application of the Attorney General at the request of the Commission may issue such orders or decrees as they deem a part of the Commission's enforcing its duties to the Act. Upon the request of the Commission it is the duty of any district attorney of the United States in which the Commission may apply to institute and prosecute under the direction of the Attorney General all necessary proceedings for the enforcement of the Act and for the punishment of transgressions thereof. In so far as they applied to discriminations and departures from the rules of the Act these provisions were re-enacted and strengthened by the Elkins Act of Feb. 19, 1903. Besides its duties under the Interstate Commerce Act the Commission is charged with the enforcement of the Safety Appliance Acts of April 14, 1901, and the Ash-Pan Act of May 30, 1906, and for that purpose is authorized to use all the powers with which it is vested under any enactment of Congress. It is also required to lodge with the proper district attorney any information which it may acquire as to violations of the Hours of Service Act of March 4, 1907, and is authorized to enforce any orders which it may make in consequence of the powers vested in it by the Government-aided Railroad and Telegraph Act of August 7, 1888. The Commission is also charged with the enforcement of the Clayton Anti-trust Act of October 15, 1914, in so far as that Act relates to carriers. For the purpose of aiding it in the accomplishment of the objects for which it was established, the Commission may require carriers subject to the Act to file annual reports of their operations, and monthly reports of their earnings and expenses, together with such special reports as may be desired on specific matters as to which the Commission is required to keep itself informed. The Commission may also prescribe a uniform system of accounts for all carriers, and shall have access at all times

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to all accounts, records, and memoranda kept by carriers subject to the Act. And no other accounts, records, or memoranda than those prescribed or approved by the Commission may be kept by any such carrier.

§ 1157. Judicial process in aid of proceedings before the Commission.

Section 12 of the Act provides that the Commission shall have authority to inquire into the management of the business of all common carriers subject to the provisions of the Act, and shall keep itself informed as to the manner and method in which the same is conducted. For this purpose it is empowered to obtain from the carriers whatever information may be necessary to enable it to carry out the objects for which it was created. To this end it is provided that "for the purposes of this Act the Commission may require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation." In case of contumacy or refusal to obey a subpoena issued by the Commission, a district court of the United States may issue an order requiring such common carrier or other person to appear before the Commission and produce books and papers if so ordered and give evidence touching the matter in question. Any failure to obey such order may be punished by the court as contempt thereof. No witness may be excused from testifying on the ground that his evidence might tend to incriminate him, but such evidence may not be used against him on the trial of any criminal proceeding except for perjury committed while so testifying. Soon after these provisions authorizing the Commission to resort to the courts for assistance in obtaining testimony were enacted, the contention was set up that such a proceeding before the courts was not a case or controversy within the meaning of the Constitution and was not a judicial function and hence could not be

required of the courts. But the court held that the functions entrusted to the Commission were within the power of Congress to regulate commerce and that they could not be discharged without the taking of testimony. The Commission, however, not being a judicial body, could not compel testimony and it must therefore receive the assistance of the courts. An application to the courts for an order compelling a witness to appear and testify presents all the elements of a judicial controversy, for in determining whether or not the order should issue the court is obliged to determine whether the Commission is entitled to the evidence which it seeks and whether the refusal of the witness to testify or to produce papers is in derogation of the rights of the United States.³ These questions were presented in a case in which the Commission, in the course of an investigation initiated on its own motion, sought an order compelling testimony from a witness who refused to testify on the ground that the questions did not relate to any affirmative provision of the Act which it was the duty of the Commission to enforce, and another witness who refused to answer on the ground that the questions related to the business of a private banking house and not to that of a carrier. The Commission contended that it was authorized to make investigations not only for the purpose of ascertaining whether the Act had been violated but also as a basis for recommending additional legislation to Congress, and that its power to compel testimony was the same in the two cases. But the court held that no such general inquisitorial power had been vested in the Commission, and that its power to compel testimony was confined to the investigation of specific breaches of existing law.⁴ The power of the Commission has been further

³ *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 38 L. ed. 104, 14 Sup. Ct. 1125; *Interstate Commerce Commission v.*

Baird, 194 U. S. 25, 48 L. ed. 860, 24 Sup. Ct. 563.

⁴ *Harriman v. Interstate Commerce Commission*, 211 U. S. 407, 53 L. ed. 253, 29 Sup. Ct. 115.

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limited by the decision of the Supreme Court on February 23, 1915, to the effect that the correspondence of a carrier is not included among those papers which a witness may be required to produce.⁵

§ 1158. Judicial action necessary to the enforcement of orders.

No order of the Commission is self-executing. Should the carrier against whom it is directed not choose to obey it, it can be enforced only through judicial proceedings as provided for in section 16 of the Act.⁶ This section clearly distinguishes suits to enforce administrative orders of the Commission, which are in equity, where the only issue is as to the legality of the order, and an action to recover reparation awarded. The latter is not a suit to enforce the order, but an action at law triable by jury and the proceedings are as in other civil actions, save that the findings and order of the Commission are received as *prima facie* evidence of the facts stated.⁷ Section 16 provides that if a carrier does not comply with an order for the payment of money within the time limit set in the order, the complainant or any person for whose benefit the order was made may file in the district court of the United States a petition setting forth briefly the causes for which he claims damages and the order of the Commission. Such suit shall then proceed in all respects like other civil suits for damages except that on the trial of such suit the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail, he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of his

⁵ Louisville & Nashville Ry. case, Penn Refining Co., 137 Fed. 343. decision announced Feb. 23, 1915.

⁷ Lehigh Valley Ry. v. Meeker, 211

⁶ Western N. Y. & P. Ry. v. Fed. 785.

suit.⁸ A petition for the enforcement of an order for the payment of money shall be filed in the district court or State court within one year from the date of the order. In this connection attention may be called to fines and forfeitures provided in the Act for disobedience of the orders of the Commission which have already been set forth in section 1131.

§ 1159. Parties to enforcement suits.

If a carrier does not comply with an order for the payment of money within the time limit in such order, section 16 provides that an action for its enforcement may be brought by the complainant or any person for whose benefit such order was made. In such suits all parties in whose favor the Commission may have made an award for damages by a single order may be joined as plaintiffs, and all of the carriers parties to such order awarding such damages may be joined as defendants. If any carrier fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Interstate Commerce Commission or any party injured thereby, or the United States by its Attorney-General, may apply to a district court of the United States for the enforcement of such order. When a case of this kind reaches the court on petition of the Commission, the complaint will be regarded as that of the Commission rather than as that of the parties who in the first instance induced the Commission to take action.⁹ If, after hearing,

⁸ This provision regarding attorney's fees has been declared constitutional. *Riverside Mills v. A. C. L. Ry.*, 168 Fed. 990; *Chicago, B. & Q. Ry. v. Feintuch*, 191 Fed. 482.

In a suit to enforce an order of the Commission awarding reparation for diverting a shipment from the specified route, plaintiff is entitled to an allowance for an attorney's fee on account of the appellate proceedings, in addition to the allowance made

by the Circuit Court. *Louisville & Nashville R. R. Co. v. Dickerson*, 191 Fed. 705.

In a suit against the initial carrier to recover for loss of goods, no authority is given to tax attorneys' fees by section 8 of the Act. *Atlantic Coast Line v. Riverside Mills*, 219 U. S. 186, 55 L. ed. 167, 31 Sup. Ct. 164.

⁹ *Interstate Commerce Commission v. D., G. H. & M. Ry.*, 57 Fed. 1005.

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the court determines that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the court shall enforce obedience by a writ of injunction or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it or them obedience to the same. In the case of a carrier which goes into the hands of a receiver after an order has been issued to it by the Commission, the court follows the same procedure in a suit for enforcement of the order as it would have followed if the railway had continued to be operated by its own officers.¹⁰

§ 1160. Orders unenforceable because of defects.

It sometimes happens that the Commission fails to give expression to its will in such a form that the courts will undertake to enforce it. It is perhaps not correct in such case to say that the order is invalid. It is nearer the truth to say that the Commission's pronouncement is not an order either in substance or in form, and hence there is nothing for the courts to act upon. Where an order of the Commission grants permission to the carriers against whom it is directed to charge lower rates on competitive traffic to longer distance points than are charged to intermediate points on non-competitive traffic, but directs that the rates to the longer distance points shall not be lower than the necessities of competition require, such order is a mere general statement of the duty of the carriers as defined by the Act, and is too indefinite to be enforced.¹¹ A mere finding without an order is not enforceable. The Commission found certain lighterage allowances to constitute an unlawful rebate and prohibited them, but entered no order. In a suit to recover the allowances yet unpaid, the Circuit Court denied recovery on the ground

¹⁰ *Farmers' Loan & Trust Co. v. No. Pac. Ry.*, 83 Fed. 249. 249, refusing to enforce order of the Commission, *Merchants' Union of*

¹¹ *Farmers' Loan & Trust Co. v. Spokane Falls v. Northern Pac. Ry.*, Northern Pac. Ry. Co., 83 Fed. Rep. 5 I. C. C. R. 478, 4 I. C. R. 183.

suit.⁸ A petition for the enforcement of an order for the payment of money shall be filed in the district court or State court within one year from the date of the order. In this connection attention may be called to fines and forfeitures provided in the Act for disobedience of the orders of the Commission which have already been set forth in section 1131.

§ 1159. Parties to enforcement suits.

If a carrier does not comply with an order for the payment of money within the time limit in such order, section 16 provides that an action for its enforcement may be brought by the complainant or any person for whose benefit such order was made. In such suits all parties in whose favor the Commission may have made an award for damages by a single order may be joined as plaintiffs, and all of the carriers parties to such order awarding such damages may be joined as defendants. If any carrier fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Interstate Commerce Commission or any party injured thereby, or the United States by its Attorney-General, may apply to a district court of the United States for the enforcement of such order. When a case of this kind reaches the court on petition of the Commission, the complaint will be regarded as that of the Commission rather than as that of the parties who in the first instance induced the Commission to take action.⁹ If, after hearing,

⁸ This provision regarding attorney's fees has been declared constitutional. *Riverside Mills v. A. C. L. Ry.*, 168 Fed. 990; *Chicago, B. & Q. Ry. v. Feintuch*, 191 Fed. 482.

In a suit to enforce an order of the Commission awarding reparation for diverting a shipment from the specified route, plaintiff is entitled to an allowance for an attorney's fee on account of the appellate proceedings, in addition to the allowance made

by the Circuit Court. *Louisville & Nashville R. R. Co. v. Dickerson*, 191 Fed. 705.

In a suit against the initial carrier to recover for loss of goods, no authority is given to tax attorneys' fees by section 8 of the Act. *Atlantic Coast Line v. Riverside Mills*, 219 U. S. 186, 55 L. ed. 167, 31 Sup. Ct. 164.

⁹ *Interstate Commerce Commission v. D., G. H. & M. Ry.*, 57 Fed. 1005.

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the court determines that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the court shall enforce obedience by a writ of injunction or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it or them obedience to the same. In the case of a carrier which goes into the hands of a receiver after an order has been issued to it by the Commission, the court follows the same procedure in a suit for enforcement of the order as it would have followed if the railway had continued to be operated by its own officers.¹⁰

§ 1160. Orders unenforceable because of defects.

It sometimes happens that the Commission fails to give expression to its will in such a form that the courts will undertake to enforce it. It is perhaps not correct in such case to say that the order is invalid. It is nearer the truth to say that the Commission's pronouncement is not an order either in substance or in form, and hence there is nothing for the courts to act upon. Where an order of the Commission grants permission to the carriers against whom it is directed to charge lower rates on competitive traffic to longer distance points than are charged to intermediate points on non-competitive traffic, but directs that the rates to the longer distance points shall not be lower than the necessities of competition require, such order is a mere general statement of the duty of the carriers as defined by the Act, and is too indefinite to be enforced.¹¹ A mere finding without an order is not enforceable. The Commission found certain lighterage allowances to constitute an unlawful rebate and prohibited them, but entered no order. In a suit to recover the allowances yet unpaid, the Circuit Court denied recovery on the ground

¹⁰ *Farmers' Loan & Trust Co. v. No. Pac. Ry.*, 83 Fed. 249. 249, refusing to enforce order of the Commission, *Merchants' Union of*

¹¹ *Farmers' Loan & Trust Co. v. Northern Pac. Ry. Co.*, 83 Fed. Rep. 5 I. C. C. R. 478, 4 I. C. R. 183. *Spokane Falls v. Northern Pac. Ry.*,

that the finding of the Commission without an order operated to remove the allowances from the carrier's tariff, and hence the carrier was no longer liable. But the Circuit Court of Appeals reversed this decision and held that the mere finding of the Commission without an order had no effect on a published tariff, and hence the carrier continued to be liable.¹² Since the orders of the Commission are not self-executing, they can be made effective only by the help of the courts. In proceedings for the enforcement of the Commission's orders, or for the collection of damages based upon the Commission's award of reparation, the carrier has opportunity to raise the question as to the validity of the Commission's action. If its order or award was invalid on any of the grounds discussed in the preceding sections, its order cannot be enforced nor can its award be reduced to judgment.

§ 1161. Power of courts to modify Commission's orders.

In judicial proceedings for the enforcement of the orders of the Commission, the courts are not at liberty to mould them into a form in which they can receive approval. If the order is not lawful, the courts are without power to enforce it.¹³ The courts must take the order as it was made, and if it is not valid in that form, no relief can be granted.¹⁴ Their power is limited to an approval or disapproval of the order before them, and to the enforcement or refusal to enforce it as a whole or in part, as made by the Commission.¹⁵ The court has no power, under the guise of enforcing an order of the Commission, to make a general adjustment of differences between litigants, or

¹² *American Sugar Refining Co. v. D., L. & W. Ry.*, 207 Fed. 733, 200 Fed. 652, 14 I. C. C. 619.

¹³ *Southern Pacific Ry. v. Interstate Commerce Commission*, 200 U. S. 536, 50 L. ed. 585, 26 Sup. Ct. 330.

¹⁴ *Detroit, G. H. & M. Ry. v.*

Interstate Commerce Commission, 74 Fed. 803; *Farmers' Loan & Trust Co. v. No. Pac. Ry.*, 83 Fed. 249.

¹⁵ *Interstate Commerce Commission v. L. & N. Ry.*, 73 Fed. 409; *Interstate Commerce Commission v. L. S. & M. S. Ry.*, 134 Fed.

942.

to correct abuses by a carrier in the conduct of its business.¹⁶ It can make no order or decree of its own, nor modify the order for the purpose of making it conform to the opinion of the court, in case that opinion should differ from the view taken by the Commission.¹⁷ While it is true that in enforcement proceedings, the cause of action is examined *de novo*, and in a qualified sense is independent of the investigation by the Commission, the relief to be obtained must be confined to that included in the Commission's order.¹⁸ Even though, upon the court's refusal to enforce an order, the Commission moved for a rehearing on the ground that its order was not intended to be as broad as indicated by its terms, yet the court held that it was confined to the order which was actually made and could not substitute for it another which the Commission might or should have made, or one which it intended, but failed to make.¹⁹ But in passing upon an order issued by the Commission, the court is not confined to the grounds or reasons assigned by the Commission as the basis of its conclusion, but may, without going beyond the issue, reach a like or different conclusion upon the same or other grounds or reasons.²⁰ Hence though the order may not be warranted by that section of the Act which the Commission relied upon, it may nevertheless be enforced because sustained by some other section of the Act.²¹

§ 1162. Sufficiency of averments.

In a suit in a Federal court for the enforcement of an order of the Commission or for damages growing out of a violation of the Act, the complainant, whether it be the

¹⁶ *Farmers' Loan & Trust Co. v. No. Pac. Ry.*, 83 Fed. 249.

¹⁷ *Interstate Commerce Commission v. L. & N. Ry.*, 73 Fed. 409.

¹⁸ *Western New York & Pennsylvania Ry. v. Penn Refining Co.*, 137 Fed. 343, 70 C. C. A. 23.

¹⁹ *Interstate Commerce Commission v. D., L. & W. Ry.*, 64 Fed. 723.

²⁰ *Interstate Commerce Commission v. Southern Pacific Ry.*, 132 Fed. 829.

²¹ *Southern Pacific Ry. v. Interstate Commerce Commission*, 200 U. S. 536, 50 L. ed. 585, 26 Sup. Ct. 330; *Interstate Commerce Commission v. E. T., V. & G. Ry.*, 85 Fed. 107.

Commission or any other party in interest, must show either a case of individual grievance or of public inconvenience resulting from the acts of the carrier in violation of the Act.²² In a suit to enforce an order of reparation, if the petition and the record show that the cause of action before the court is the same as that before the Commission, it is not necessary that the order of the Commission, when offered in evidence, should also state the cause of action.²³ If the petition is based upon some breach of duty by the carrier, the breach must be specified, for the court will otherwise presume that the carrier has complied with the law. Hence in a suit for damages because of an alleged unjust or discriminatory charge, where there was no averment that the carrier had failed to file or post its tariff, the court is bound to presume that the tariff has been filed and that the charge complained of was made thereunder, and hence can grant no relief without prior action by the Commission.²⁴ Furthermore if the relief sought depends upon prior action by the Commission, such action must appear in the petition. Hence in a suit to recover damages for the exaction of excessive and unreasonable rates, the declaration must allege specifically that the rates complained of have been declared excessive or unreasonable by the Interstate Commerce Commission, since under the Act as amended June 29, 1906, recovery cannot be had in the courts until the Commission has passed upon the rates, and an allegation merely that "plaintiffs have been obliged to pay excessive and unreasonable rates" is not sufficient.²⁵ It has even been held that the Commission's order must be produced.²⁶ The requirement of the Act that the petitioner shall set forth briefly the causes for which he claims damages is not

²² Interstate Commerce Commission v. B. & O. Ry., 43 Fed. 37.

²³ Chicago, B. & Q. Ry. v. Feintuch, 191 Fed. 482.

²⁴ Clement v. L. & N. Ry., 153 Fed. 979.

²⁵ Meeker v. Lehigh Valley Ry., 162 Fed. 354.

²⁶ Geraty v. A. C. L. Ry., 211 Fed. 227.

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satisfied by setting forth the proceedings of the Commission in which the causes of the complaint appear.²⁷ But even if the petition avers that the Commission has declared the rate unreasonable, suit will fail if it does not also aver that the complainant has paid the rate so condemned.²⁸ These questions as to the contents of the bill will arise whether suit is brought in a State or a Federal court.²⁹ In brief the requirement is that the bill shall state a cause of action. This requirement is satisfied in the case of joint carriers by alleging the disobedience of any one of the parties to the joint arrangement within the jurisdiction of the court, since the disobedience of one showed the disobedience of all.³⁰ The averment of service of the Commission's order must also be unequivocal, since the defendant is entitled to an allegation of service and the manner thereof in terms so clear as to permit an issue of fact. Hence it is not enough to aver that "thereafter said Commission, agreeable to the provisions of law in that regard, duly caused an authenticated copy of its said report, together with order aforesaid, to be delivered to the said defendant."³¹

§ 1163. Recovery on a reparation order of the Commission.

The Act authorizes the Commission, when it finds the complainant entitled to an award of damages, to make an order directing the carrier to pay to the complainant on or before a day named the sum to which the Commission finds him entitled. But in case the order is not obeyed, the Commission is without power to enforce it. Recourse must be had to the courts. The Act, trusting to the self-interest of the parties concerned, does not authorize the

²⁷ *Baer Bros. Mercantile Co. v. D. & R. G. Ry.*, 200 Fed. 614. Ct. 760; *Lilly Co. v. No. Pac. Ry.*, 117 Pac. (Wash. 1911) 401.

²⁸ *Darnell-Taenzler Lumber Co. v. So. Pac. Ry.*, 190 Fed. 659. ²⁹ *Interstate Commerce Commission v. W. N. Y. & P. Ry.*, 82 Fed. 192.

³⁰ *Darnell v. Illinois Central Ry.*, 225 U. S. 243, 56 L. ed. 1072, 32 Sup. ³¹ *Baer Bros. Mercantile Co. v. D. & R. G. Ry.*, 200 Fed. 614.

Commission to appear in such proceedings, but provides that they may be brought by the complainant or any person for whose benefit the order was made. While enforcement suits may be brought by persons who did not appear before the Commission,³² the better practice is for all interested shippers to file intervening petitions and obtain individual orders for reparation, upon which they may proceed in court.³³ A suit in the district court under section 16 of the Act to enforce an award of reparation is one the issues of which require a trial by jury and can only be entertained by the court when sitting as a court of law.³⁴ Such an action will lie only where the carrier has failed to comply with the Commission's order for the payment of money within the time therein specified.³⁵ Since the award of the Commission, if lawfully made and supported by sufficient evidence, gives rise to a vested right analogous to a judgment, it may be sued upon in either State or Federal courts and this is expressly authorized by § 16 of the Act.³⁶ But while an award of the Commission is analogous to a judgment, it is not a judgment in the sense that it concludes the enforcement of the claim upon which it rests in a court otherwise having jurisdiction of the cause of action. The award is merely *prima facie* evidence of the facts contained therein in an action brought on it in a State or Federal court; and when so introduced in evidence it is open to attack and may be entirely discredited.³⁷ While the finding of the Commission may establish the fact that there has been a violation of the Act, it is not decisive of the question of liability for damages either *prima facie* or otherwise.³⁸ In a suit to recover

³² Independent Ref. Ass'n v. W. N. Y. & P. Ry., 6 I. C. C. Rep. 378.

³³ Cattle Raisers' Ass'n v. C., B. & Q. Ry., 10 I. C. C. Rep. 83.

³⁴ Interstate Commerce Commission v. Western New York & P. Ry., 82 Fed. 192.

³⁵ Western New York & P. R. Co.

v. Penn Refining Co., 137 Fed. Rep. 343, 354, 70 C. C. A. 23.

³⁶ Darnell v. Ill. Cent. Ry., 225 U. S. 243, 56 L. ed. 1072, 32 Sup. Ct. 760.

³⁷ Clark Bros. Coal Mining Co. v. Penn. Ry., 88 Atl. (Pa.) 754.

³⁸ Lehigh Valley Ry. v. Meeker, 211 Fed. 785.

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on an award of reparation by the Commission, recovery was denied on the ground that the report of the Commission did not contain findings of fact sufficient to constitute a *prima facie* case of damage to the plaintiff.³⁹ The order must not only be a lawful order—one within the authority of the Commission—but the facts found must warrant the reparation which was awarded.⁴⁰ The suit for the recovery of the money awarded offers an opportunity for a judicial determination of these questions, for it is the function of the court not simply to execute the order of the Commission, but to afford a judicial inquiry surrounded by all the proper judicial safeguards as to whether the order of the Commission should have been made.⁴¹ While the action of the court is in a sense independent of the investigation by the Commission, the relief to be obtained, aside from interest and costs, must be confined to such reparation as was considered by the Commission and included in its order.⁴²

§ 1164. Findings of the Commission as evidence.

Section 16 of the Act provides that in all suits on an award of damages by the Commission, “the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated.” When the order of the Commission is not for the payment of money, the Act is silent as to the weight to be given to its findings. But doubtless the courts will follow the same rule. The respect with which the courts have been in the habit of showing to the findings of the Commission as to matters which are peculiarly within its province is thus made a legal obligation. It should be noted that this provision does not make the

³⁹ *Lehigh Valley Ry. v. Clark*, 207 Fed. 717 (C. C. A.).

⁴⁰ *Western N. Y. & P. Ry. v. Penn Refining Co.*, 137 Fed. 343, 70 C. C. A. 23.

⁴¹ *Interstate Commerce Commission v. A., T. & S. F. Ry.*, 50 Fed.

295; *Interstate Commerce Commission v. C., P. & V. Ry.*, 124 Fed. 630; *Baer Brothers' Mercantile Co. v. D. & R. G. Ry.*, 200 Fed. 614.

⁴² *Western N. Y. & P. Ry. v. Penn Refining Co.*, 137 Fed. 343, 70 C. C. A. 23.

findings of the Commission conclusive. Because the Act makes certain findings of fact by the Commission *prima facie* evidence of such facts it does not at all follow that it also determines their probative force.⁴³ Since the findings and order of the Commission are made only *prima facie* evidence, the carrier which controverts them may claim either that the findings are not supported by the evidence, or that there is other evidence tending to disprove them, or that the Commission has reached an erroneous conclusion of law. But in any case of conflicting evidence, the fact that the findings of the Commission are made by law *prima facie* true may make them the determining factor, and to this must be added the weight due to the Commission's special knowledge of transportation conditions and the fact that it had the witnesses before it and saw their manner of testifying.⁴⁴ In every case, therefore, the burden of proof is on the carrier seeking to overthrow the Commission's findings,⁴⁵ which can only be done by preponderant and controlling evidence which rebuts and disproves the result arrived at by the Commission.⁴⁶ Whether the suit for the enforcement of the Commission's order was instituted by the Commission or by the original complainant before that body does not affect the weight to be given to the Commission's findings.⁴⁷ As the findings of fact are not conclusive against the carrier, so they are not conclusive in its favor. Therefore a demurrer will not lie to a petition by the Interstate Commerce Commission to compel a railroad company to desist from exacting unreasonable rates on the ground that the Commission's findings of fact do not support its order if the findings

⁴³ Lehigh Valley Ry. v. Clark, 207 Fed. 717.

⁴⁴ Illinois Central Ry. v. Interstate Commerce Commission, 206 U. S. 441, 51 L. ed. 1128, 27 Sup. Ct. 700.

⁴⁵ Interstate Commerce Commission v. L. & N. Ry., 118 Fed. 613,

Interstate Commerce Commission v. C., H. & D. Ry., 146 Fed. 559.

⁴⁶ Tift v. Southern Ry., 138 Fed. 753.

⁴⁷ Interstate Commerce Commission v. Lehigh Valley Ry., 49 Fed. 177.

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expressly state that the charge made is unreasonable, although the findings may not appeal to the judgment of the court upon the merits.⁴⁸ The findings of the Commission should be so set forth in its report as to exclude extraneous, embarrassing or incompetent matter calculated to confuse or mislead.⁴⁹ The report should not be made up of mere conclusions, but should give the parties affected, as well as the court before which enforcement proceedings are brought, definite and distinct information as to what was found as facts, and the Commission's opinion thereon, such as would be necessary to make a judicial opinion sufficient and satisfactory for ordinary litigation.⁵⁰

⁴⁸ Interstate Commerce Commission v. C., B. & Q. Ry., 94 Fed. 272. Refining Co., 137 Fed. 343, 70 C. C. A. 23.

⁵⁰ Interstate Commerce Commission v. L. & N. Ry., 73 Fed. 409.

⁴⁹ Western N. Y. & P. Ry. v. Penn

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THE ACT TO REGULATE COMMERCE AS AMENDED

§ 1. Carriers and transportation subject.

[See generally Chapters III, IV, V, and XIX, *supra*.]

SEC. 1. (*As amended June 29, 1906, April 13, 1908, and June 18, 1910.*) That the provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, and to telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending messages from one State, Territory, or District of the United States, to any other State, Territory, or District of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of this Act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one State or Territory of the United States or the District of Columbia, to any other State or Territory of the United States or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: *Provided, however*, That the provisions of this Act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid, nor shall they apply to the transmission of messages by telephone, telegraph, or cable wholly within one State and not transmitted to or from a foreign country from or to any State or Territory as aforesaid.

The term "common carrier" as used in this Act shall include express companies and sleeping car companies. The term "railroad" as used in this Act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the trans-

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portation or delivery of any of said property; and the term "transportation" shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto; and to provide reasonable facilities for operating such through routes and to make reasonable rules and regulations with respect to the exchange, interchange, and return of cars used therein, and for the operation of such through routes, and providing for reasonable compensation to those entitled thereto.

All charges made for any service rendered or to be rendered in the transportation of passengers or property and for the transmission of messages by telegraph, telephone, or cable, as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: *Provided*, That messages by telegraph, telephone, or cable, subject to the provisions of this Act, may be classified into day, night, repeated, unrepeatd, letter, commercial, press, Government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages: *And provided further*, That nothing in this Act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers, for the exchange of services.

And it is hereby made the duty of all common carriers subject to the provisions of this Act to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this Act which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this Act upon just and reasonable terms, and every such unjust and unreasonable classification, regulation, and practice with reference to commerce between the States and with foreign countries is prohibited and declared to be unlawful.

No common carrier subject to the provisions of this Act shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosy-

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nary work; to indigent, destitute, and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge; to necessary care takers of live stock, poultry, milk, and fruit; to employees on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to Railway Mail Service employees, post-office inspectors, customs inspectors, and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks and physicians and nurses attending such persons; *Provided*, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation: *And provided further*, That this provision shall not be construed to prohibit the privilege of passes or franks, or the exchange thereof with each other, for the officers, agents, employees, and their families of such telegraph, telephone, and cable lines, and the officers, agents, employees and their families of other common carriers subject to the provisions of this Act: *Provided further*, That the term "employees" as used in this paragraph shall include furloughed, pensioned, and superannuated employees, persons who have become disabled or infirm in the service of any such common carrier, and the remains of a person killed in the employment of a carrier and ex-employees traveling for the purpose of entering the service of any such common carrier; and the term "families" as used in this paragraph shall include the families of those persons named in this proviso, also the families of persons killed, and the widows during widowhood and minor children during minority of persons who died, while in the service of any such common carrier. Any common carrier violating this provision shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation shall be subject to a like penalty. Jurisdiction of offenses under this provision shall be the same as that provided for offenses in an Act entitled "An Act to further regulate commerce with foreign nations and among the States," approved February nineteenth, nineteen hundred and three, and any amendment thereof. (*See section 22.*)

From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier.

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exercise all the powers of the Commission. (*See section 24, enlarging Commission and increasing salaries.*)

§ 12. Its powers and duties.

[See generally Chapters XXII and XXIII, *supra*.]

SEC. 12. (*As amended March 2, 1889, and February 10, 1891.*) That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this Act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and enforce the provisions of this Act; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this Act and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this Act the Commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

And any of the circuit courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any common carrier subject to the provisions of this Act, or other person, issue an order requiring such common carrier or other person to appear before said Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

The testimony of any witness may be taken, at the instance of a party, in any proceeding or investigation pending before the Commission, by deposition, at any time after a cause or proceeding is at issue on petition and answer. The Commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such depositions may be taken before any judge of any

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their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.

§ 4. Long and short haul applications.

[See generally Chapters XII and XVI, *supra*.]

SEC. 4. (*As amended June 18, 1910.*) That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through route than the aggregate of the intermediate rates subject to the provisions of this Act; but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for a longer distance: *Provided, however*, That upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section: *Provided further*, That no rates or charges lawfully existing at the time of the passage of this amendatory Act shall be required to be changed by reason of the provisions of this section prior to the expiration of six months after the passage of this Act, nor in any case where application shall have been filed before the Commission, in accordance with the provisions of this section, until a determination of such application by the Commission.

Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition.

§ 5. Pooling and other incorporate relations.

[See generally Chapters VIII and XX, *supra*.]

SEC. 5. (*As amended August 24, 1912.*) That it shall be unlawful for any common carrier subject to the provisions of this Act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offense.

From and after the first day of July, nineteen hundred and fourteen, it shall be unlawful for any railroad company or other common carrier subject to the Act to regulate commerce to own, lease, operate, control, or have any

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interest whatsoever (by stock ownership or otherwise, either directly, indirectly, through any holding company, or by stockholders or directors in common, or in any other manner) in any common carrier by water operated through the Panama Canal or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic or any vessel carrying freight or passengers upon said water route or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic; and in case of the violation of this provision each day in which such violation continues shall be deemed a separate offense.

Jurisdiction is hereby conferred on the Interstate Commerce Commission to determine questions of fact as to the competition or possibility of competition, after full hearing, on the application of any railroad company or other carrier. Such application may be filed for the purpose of determining whether any existing service is in violation of this section and pray for an order permitting the continuance of any vessel or vessels already in operation, or for the purpose of asking an order to install new service not in conflict with the provisions of this paragraph. The Commission may on its own motion or the application of any shipper institute proceedings to inquire into the operation of any vessel in use by any railroad or other carrier which has not applied to the Commission and had the question of competition or the possibility of competition determined as herein provided. In all such cases the order of said Commission shall be final.

If the Interstate Commerce Commission shall be of the opinion that any such existing specified service by water other than through the Panama Canal is being operated in the interest of the public and is of advantage to the convenience and commerce of the people, and that such extension will neither exclude, prevent, nor reduce competition on the route by water under consideration, the Interstate Commerce Commission may, by order, extend the time during which such service by water may continue to be operated beyond July first, nineteen hundred and fourteen. In every case of such extension the rates, schedules, and practices of such water carrier shall be filed with the Interstate Commerce Commission and shall be subject to the Act to regulate commerce and all amendments thereto in the same manner and to the same extent as is the railroad or other common carrier controlling such water carrier or interested in any manner in its operation: *Provided*, Any application for extension under the terms of this provision filed with the Interstate Commerce Commission prior to July first, nineteen hundred and fourteen, but for any reason not heard and disposed of before said date, may be considered and granted thereafter.

No vessel permitted to engage in the coastwise or foreign trade of the United States shall be permitted to enter or pass through said canal if such ship is owned, chartered, operated, or controlled by any person or company which is doing business in violation of the provisions of the Act of Congress approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," or the provisions of sections seventy-three to seventy-seven, both inclusive, of an Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Govern-

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ment, and for other purposes," or the provisions of any other Act of Congress amending or supplementing the said Act of July second, eighteen hundred and ninety, commonly known as the Sherman Antitrust Act and amendments thereto, or said sections of the Act of August twenty-seventh, eighteen hundred and ninety-four. The question of fact may be determined by the judgment of any court of the United States of competent jurisdiction in any cause pending before it to which the owners or operators of such ship are parties. Suit may be brought by any shipper or by the Attorney General of the United States.

§ 6. Publication and posting of schedules.

[See generally Chapters XVII and XXII, *supra*.]

SEC. 6. (*Amended March 2, 1889. Following section substituted June 29, 1906. Amended June 18, 1910, and August 24, 1912.*) That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act.

Any common carrier subject to the provisions of this Act receiving freight in the United States to be carried through a foreign country to any place in the United States shall also in like manner print and keep open to public inspection, at every depot or office where such freight is received for shipment, schedules showing the through rates established and charged by such common carrier to all points in the United States beyond the foreign country to which it accepts freight for shipment; and any freight shipped from the United States through a foreign country into the United States the through rate on which shall not have been made public, as required by this Act, shall, before it is admitted into the United States from said foreign

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country, be subject to customs duties as if said freight were of foreign production.

No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: *Provided*, That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions.

The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties.

Every common carrier subject to this Act shall also file with said Commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this Act to which it may be a party.

The Commission may determine and prescribe the form in which the schedules required by this section to be kept open to public inspection shall be prepared and arranged and may change the form from time to time as shall be found expedient.

No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs: *Provided*, That wherever the word "carrier" occurs in this Act it shall be held to mean "common carrier."

That in time of war or threatened war preference and precedence shall, upon the demand of the President of the United States, be given, over all other traffic, to the transportation of troops and material of war, and carriers shall adopt every means within their control to facilitate and expedite the military traffic.

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The Commission may reject and refuse to file any schedule that is tendered for filing which does not provide and give lawful notice of its effective date, and any schedule so rejected by the Commission shall be void and its use shall be unlawful.

In case of failure or refusal on the part of any carrier, receiver, or trustee to comply with the terms of any regulation adopted and promulgated or any order made by the Commission under the provisions of this section, such carrier, receiver, or trustee shall be liable to a penalty of five hundred dollars for each such offense, and twenty-five dollars for each and every day of the continuance of such offense, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

If any common carrier subject to the provisions of this Act, after written request made upon the agent of such carrier hereinafter in this section referred to, by any person or company for a written statement of the rate or charge applicable to a described shipment between stated places under the schedules or tariffs to which such carrier is a party, shall refuse or omit to give such written statement within a reasonable time, or shall misstate in writing the applicable rate, and if the person or company making such request suffers damage in consequence of such refusal or omission or in consequence of the misstatement of the rate, either through making the shipment over a line or route for which the proper rate is higher than the rate over another available line or route, or through entering into any sale or other contract whereunder such person or company obligates himself or itself to make such shipment of freight at his or its cost, then the said carrier shall be liable to a penalty of two hundred and fifty dollars, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

It shall be the duty of every carrier by railroad to keep at all times conspicuously posted in every station where freight is received for transportation the name of an agent resident in the city, village, or town where such station is located, to whom application may be made for the information by this section required to be furnished on written request; and in case any carrier shall fail at any time to have such name so posted in any station, it shall be sufficient to address such request in substantially the following form: "The Station Agent of the ——— Company at ——— Station," together with the name of the proper post office, inserting the name of the carrier company and of the station in the blanks, and to serve the same by depositing the request so addressed, with postage thereon prepaid, in any post office.

When property may be or is transported from point to point in the United States by rail and water through the Panama Canal or otherwise, the transportation being by a common carrier or carriers, and not entirely within the limits of a single State, the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, in addition to the jurisdiction given by the Act to regulate commerce, as amended June eighteenth, nineteen hundred and ten:

(a) To establish physical connection between the lines of the rail carrier and the dock of the water carrier by directing the rail carrier to make suitable connection between its lines and a track or tracks which have been constructed

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from the dock to the limits of its right of way, or by directing either or both the rail and water carrier, individually or in connection with one another, to construct and connect with the lines of the rail carrier a spur track or tracks to the dock. This provision shall only apply where such connection is reasonably practicable, can be made with safety to the public, and where the amount of business to be handled is sufficient to justify the outlay.

The Commission shall have full authority to determine the terms and conditions upon which these connecting tracks, when constructed, shall be operated, and it may, either in the construction or the operation of such tracks, determine what sum shall be paid to or by either carrier. The provisions of this paragraph shall extend to cases where the dock is owned by other parties than the carrier involved.

(b) To establish through routes and maximum joint rates between and over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced.

(c) To establish maximum proportional rates by rail to and from the ports to which the traffic is brought, or from which it is taken by the water carrier, and to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates shall apply. By proportional rates are meant those which differ from the corresponding local rates to and from the port and which apply only to traffic which has been brought to the port or is carried from the port by a common carrier by water.

(d) If any rail carrier subject to the Act to regulate commerce enters into arrangements with any water carrier operating from a port in the United States to a foreign country, through the Panama Canal or otherwise, for the handling of through business between interior points of the United States and such foreign country, the Interstate Commerce Commission may require such railway to enter into similar arrangements with any or all other lines of steamships operating from said port to the same foreign country.

The orders of the Interstate Commerce Commission relating to this section shall only be made upon formal complaint or in proceedings instituted by the Commission of its own motion and after full hearing. The orders provided for in the two amendments to the Act to regulate commerce enacted in this section shall be served in the same manner and enforced by the same penalties and proceedings as are the orders of the Commission made under the provisions of section fifteen of the Act to regulate commerce, as amended June eighteenth, nineteen hundred and ten, and they may be conditioned for the payment of any sum or the giving of security for the payment of any sum or the discharge of any obligation which may be required by the terms of said order.

§ 7. Continuous carriage of freights.

[See generally Chapters III and XVIII, *supra*.]

SEC. 7. That it shall be unlawful for any common carrier subject to the provisions of this Act to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no

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break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this Act.

§ 8. Liability of carriers for damages.

[See generally Chapters XXII and XXIV, *supra*.]

SEC. 8. That in case any common carrier subject to the provisions of this Act shall do, cause to be done, or permit to be done any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

§ 9. Jurisdiction of such suits.

[See generally Chapters XXI and XXIII, *supra*.]

SEC. 9. That any person or persons claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

§ 10. Penalties for violation of the act.

[See generally Chapters XIV, XVII, XXIII, and XXIV, *supra*.]

SEC. 10. (*As amended March 2, 1889, and June 18, 1910.*) That any common carrier subject to the provisions of this Act, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this Act prohibited or declared to be unlawful,

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or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing in this Act required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this Act to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this Act for which no penalty is otherwise provided, or who shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense: *Provided*, That if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges for the transportation of passengers or property, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court.

Any common carrier subject to the provisions of this Act, or, whenever such common carrier is a corporation, any officer or agent thereof, or any person acting for or employed by such corporation, who, by means of false billing, false classification, false weighing, or false report of weight, or by any other device or means, shall knowingly and willfully assist, or shall willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense.

Any person, corporation, or company, or any agent or officer thereof, who shall deliver property for transportation to any common carrier subject to the provisions of this Act, or for whom, as consignor or consignee, any such carrier shall transport property, who shall knowingly and willfully, directly or indirectly, himself or by employee, agent, officer, or otherwise, by false billing, false classification, false weighing, false representation of the contents of the package or the substance of the property, false report of weight, false statement, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent, or officer, obtain or attempt to obtain transportation for such property at less than the regular rates then established and in force on the line of transportation; or who shall knowingly and willfully, directly or indirectly, himself or by employee, agent, officer, or otherwise, by false statement or representation as to cost, value, nature, or extent of injury, or by the use of any false bill, bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to be false, fictitious, or fraudulent, or to contain any false, fictitious, or fraudulent statement or entry, obtain or attempt to obtain any allowance, refund, or payment for damage or otherwise in connection with or growing out of the transportation of or agreement to transport such property, whether with or without the consent or connivance of the carrier, whereby the compensation

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of such carrier for such transportation, either before or after payment, shall in fact be made less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was wholly or in part committed, be subject for each offense to a fine of not exceeding five thousand dollars or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court: *Provided*, That the penalty of imprisonment shall not apply to artificial persons.

If any such person, or any officer or agent of any such corporation or company, shall, by payment of money or other thing of value, solicitation, or otherwise, induce or attempt to induce any common carrier subject to the provisions of this Act, or any of its officers or agents, to discriminate unjustly in his, its, or their favor as against any other consignor or consignee in the transportation of property, or shall aid or abet any common carrier in any such unjust discrimination, such person or such officer or agent of such corporation or company shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense; and such person, corporation, or company shall also, together with said common carrier, be liable, jointly or severally, in an action to be brought by any consignor or consignee discriminated against in any court of the United States of competent jurisdiction for all damages caused by or resulting therefrom.

§ 11. Organization of the commission.

[See generally Chapters II and XXI, *supra*.]

SEC. 11. That a Commission is hereby created and established to be known as the Interstate Commerce Commission, which shall be composed of five Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. The Commissioners first appointed under this Act shall continue in office for the term of two, three, four, five, and six years, respectively, from the first day of January, Anno Domini eighteen hundred and eighty-seven, the term of each to be designated by the President; but their successors shall be appointed for terms of six years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired time of the Commissioner whom he shall succeed. Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. Not more than three of the Commissioners shall be appointed from the same political party. No person in the employ of or holding any official relation to any common carrier subject to the provisions of this Act, or owning stock or bonds thereof, or who is in any manner pecuniarily interested therein, shall enter upon the duties of or hold such office. Said Commissioners shall not engage in any other business, vocation, or employment. No vacancy in the Commission shall impair the right of the remaining Commissioners to

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exercise all the powers of the Commission. (*See section 24, enlarging Commission and increasing salaries.*)

§ 12. Its powers and duties.

[See generally Chapters XXII and XXIII, *supra*.]

SEC. 12. (*As amended March 2, 1889, and February 10, 1891.*) That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this Act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and enforce the provisions of this Act; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this Act and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this Act the Commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

And any of the circuit courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any common carrier subject to the provisions of this Act, or other person, issue an order requiring such common carrier or other person to appear before said Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

The testimony of any witness may be taken, at the instance of a party, in any proceeding or investigation pending before the Commission, by deposition, at any time after a cause or proceeding is at issue on petition and answer. The Commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such depositions may be taken before any judge of any

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court of the United States, or any commissioner of a circuit, or any clerk of a district or circuit court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court, or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the proceeding or investigation. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission as hereinbefore provided.

Every person deposing as herein provided shall be cautioned and sworn (or affirm, if he so request) to testify the whole truth, and shall be carefully examined. His testimony shall be reduced to writing by the magistrate taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent.

If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with the Commission. All depositions must be promptly filed with the Commission.

Witnesses whose depositions are taken pursuant to this Act, and the magistrate or other officer taking the same, shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

§ 13. Remedies provided for wrongs.

[See generally Chapters XXI and XXIII, *supra*.]

SEC. 13. (*As amended June 18, 1910.*) That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this Act, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Said Commission shall, in like manner and with the same authority and powers, investigate any complaint forwarded by the railroad commissioner

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or railroad commission of any State or Territory at the request of such commissioner or commission, and the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

§ 14. Commission must make reports.

[See generally Chapters XX and XXIII, *supra*.]

SEC. 14. (*Amended March 2, 1889, and June 29, 1906.*) That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made.

All reports of investigations made by the Commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of.

The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and such authorized publications shall be competent evidence of the reports and decisions of the Commission therein contained in all courts of the United States and of the several States without any further proof or authentication thereof. The Commission may also cause to be printed for early distribution its annual reports.

§ 15. Fixing rates and classifications.

[See generally Chapters II, V, XI, XV, XVIII and XXII, *supra*.]

SEC. 15. (*As amended June 29, 1906, and June 18, 1910.*) That whenever, after full hearing upon a complaint made as provided in section thirteen of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative (either in extension of any pending complaint or without any complaint whatever), the Commission shall be of opinion that any individual or joint rates or charges whatsoever demanded, charged, or collected by any common carrier or carriers subject to the provisions of this Act for the transportation of persons or property or for the transmission of messages by telegraph or telephone as defined in the first section of this Act, or that any individual or joint classifications, regulations, or practices whatsoever of such carrier or carriers subject to the provisions of this Act are unjust or unreasonable or unjustly discriminatory, or unduly prefer-

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entail or prejudicial or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged, and what individual or joint classification, regulation, or practice is just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation or transmission in excess of the maximum rate or charge so prescribed, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed. All orders of the Commission, except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the Commission, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction. Whenever the carrier or carriers, in obedience to such order of the Commission or otherwise, in respect to joint rates, fares, or charges, shall fail to agree among themselves upon the apportionment or division thereof the Commission may, after hearing, make a supplemental order prescribing the just and reasonable proportion of such joint rate to be received by each carrier party thereto, which order shall take effect as a part of the original order.

Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders, without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension may suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than one hundred and twenty days beyond the time when such rate, fare, charge, classification, regulation, or practice would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order in reference to such rate, fare, charge, classification, regulation, or practice as would be proper in a proceeding initiated after the rate, fare, charge, classification, regulation, or practice had become effective: *Provided*, That if any such hearing cannot be concluded within the period of suspension, as above stated, the Interstate Commerce Commission may, in its discretion, extend the time of suspension for a further period not exceeding six months. At any hearing involving a rate increased after January first, nineteen hundred and ten, or of a rate sought to be increased after the passage of this Act,

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the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the common carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

The Commission may also, after hearing, on a complaint or upon its own initiative without complaint, establish through routes and joint classifications, and may establish joint rates as the maximum to be charged and may prescribe the division of such rates as hereinbefore provided and the terms and conditions under which such through routes shall be operated, whenever the carriers themselves shall have refused or neglected to establish voluntarily such through routes or joint classifications or joint rates; and this provision shall apply when one of the connecting carriers is a water line. The Commission shall not, however, establish any through route, classification, or rate between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business and railroads of a different character, nor shall the Commission have the right to establish any route, classification, rate, fare, or charge when the transportation is wholly by water, and any transportation by water affected by this Act shall be subject to the laws and regulations applicable to transportation by water.

And in establishing such through route, the Commission shall not require any company, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith which lies between the termini of such proposed through route, unless to do so would make such through route unreasonably long as compared with another practicable through route which could otherwise be established.

In all cases where at the time of delivery of property to any railroad corporation being a common carrier, for transportation subject to the provisions of this Act to any point of destination, between which and the point of such delivery for shipment two or more through routes and through rates shall have been established as in this Act provided to which through routes and through rates such carrier is a party, the person, firm, or corporation making such shipment, subject to such reasonable exceptions and regulations as the Interstate Commerce Commission shall from time to time prescribe, shall have the right to designate in writing by which of such through routes such property shall be transported to destination, and it shall thereupon be the duty of the initial carrier to route said property and issue a through bill of lading therefor as so directed, and to transport said property over its own line or lines and deliver the same to a connecting line or lines according to such through route, and it shall be the duty of each of said connecting carriers to receive said property and transport it over the said line or lines and deliver the same to the next succeeding carrier or consignee according to the routing instructions in said bill of lading: *Provided, however,* That the shipper shall in all instances have the right to determine, where competing lines of railroad constitute portions of a through line or route, over which of said competing

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lines so constituting a portion of said through line or route his freight shall be transported.

It shall be unlawful for any common carrier subject to the provisions of this Act, or any officer, agent, or employee of such common carrier, or for any other person or corporation lawfully authorized by such common carrier to receive information therefrom, knowingly to disclose to or permit to be acquired by any person or corporation other than the shipper or consignee, without the consent of such shipper or consignee, any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to such common carrier for interstate transportation, which information may be used to the detriment or prejudice of such shipper or consignee, or which may improperly disclose his business transactions to a competitor; and it shall also be unlawful for any person or corporation to solicit or knowingly receive any such information which may be so used: *Provided*, That nothing in this Act shall be construed to prevent the giving of such information in response to any legal process issued under the authority of any state or federal court, or to any officer or agent of the Government of the United States, or of any State or Territory, in the exercise of his powers, or to any officer or other duly authorized person seeking such information for the prosecution of persons charged with or suspected of crime; or information given by a common carrier to another carrier or its duly authorized agent, for the purpose of adjusting mutual traffic accounts in the ordinary course of business of such carriers.

Any person, corporation, or association violating any of the provisions of the next preceding paragraph of this section shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the United States a penalty of not more than one thousand dollars.

If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section.

The foregoing enumeration of powers shall not exclude any power which the Commission would otherwise have in the making of an order under the provisions of this Act.

§ 16. Award of damages in reparation.

[See Chapters XIV, XXI, XXII and XXIV, *supra*.]

SEC. 16. (*Amended March 2, 1889, June 29, 1906, and June 18, 1910.*) That if, after hearing on a complaint made as provided in section thirteen of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

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If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the circuit court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any state court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the circuit court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the circuit court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court or state court within one year from the date of the order, and not after.

In such suits all parties in whose favor the Commission may have made an award for damages by a single order may be joined as plaintiffs, and all of the carriers parties to such order awarding such damages may be joined as defendants, and such suit may be maintained by such joint plaintiffs and against such joint defendants in any district where any one of such joint plaintiffs could maintain such suit against any one of such joint defendants; and service of process against any one of such defendants as may not be found in the district where the suit is brought may be made in any district where such defendant carrier has its principal operating office. In case of such joint suit the recovery, if any, may be by judgment in favor of any one of such plaintiffs, against the defendant found to be liable to such plaintiff.

Every order of the Commission shall be forthwith served upon the designated agent of the carrier in the city of Washington or in such other manner as may be provided by law.

The Commission shall be authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper.

It shall be the duty of every common carrier, its agents and employees, to observe and comply with such orders so long as the same shall remain in effect.

Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of section fifteen of this Act shall forfeit to the United States the sum of five thousand dollars for each offense. Every distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense.

The forfeiture provided for in this Act shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States, brought in the district where the carrier has its principal operating office, or in any district through which the road of the carrier runs.

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It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work or for proper representation of the public interests in investigations made by it or cases or proceedings pending before it, whether at the Commission's own instance or upon complaint, or to appear for and represent the Commission in any case pending in the Commerce Court; and the expenses of such employment shall be paid out of the appropriation for the Commission.

If any carrier fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Interstate Commerce Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the Commerce Court for the enforcement of such order. If, after hearing, that Court determines that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the Court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

The copies of schedules and classifications and tariffs of rates, fares, and charges, and of all contracts, agreements, and arrangements between common carriers filed with the Commission as herein provided, and the statistics, tables, and figures contained in the annual or other reports of carriers made to the Commission as required under the provisions of this Act shall be preserved as public records in the custody of the secretary of the Commission, and shall be received as prima facie evidence of what they purport to be for the purpose of investigations by the Commission and in all judicial proceedings; and copies of and extracts from any of said schedules, classifications, tariffs, contracts, agreements, arrangements, or reports, made public records as aforesaid, certified by the secretary, under the Commission's seal, shall be received in evidence with like effect as the originals.

§ 16a. Commission may grant rehearings.

[See Chapters XXII and XXIII, *supra*.]

SEC. 16a. (*Added June 29, 1906.*) That after a decision, order, or requirement has been made by the Commission in any proceeding any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear. Applications for rehearing shall be governed by such general rules as the Commission may establish. No such application shall excuse any carrier from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. In case a rehearing is granted the proceedings thereupon shall conform as nearly as may be to the proceedings in

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an original hearing, except as the Commission may otherwise direct; and if, in its judgment, after such rehearing and the consideration of all facts, including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after such rehearing, reversing, changing, or modifying the original determination shall be subject to the same provisions as an original order.

§ 17. Form of procedure provided.

[See generally Chapters XXI and XXIII, *supra*.]

SEC. 17. (*As amended March 2, 1889.*) That the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. A majority of the Commission shall constitute a quorum for the transaction of business, but no Commissioner shall participate in any hearing or proceeding in which he has any pecuniary interest. Said Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States. Any party may appear before said Commission and be heard, in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of either party interested. Said Commission shall have an official seal, which shall be judicially noticed. Either of the members of the Commission may administer oaths and affirmations and sign subpoenas.

§ 18. Constitution of the commission.

[See generally Chapters XXI and XXII, *supra*.]

SEC. 18. (*As amended March 2, 1889.*) [*See section 24, increasing salaries of Commissioners.*] That each Commissioner shall receive an annual salary of seven thousand five hundred dollars, payable in the same manner as the judges of the courts of the United States. The Commission shall appoint a secretary, who shall receive an annual salary of three thousand five hundred dollars, increased to \$5,000 by sundry civil act of March 4, 1907, 34 Stat. L., 1311, payable in like manner. The Commission shall have authority to employ and fix the compensation of such other employees as it may find necessary to the proper performance of its duties. Until otherwise provided by law, the Commission may hire suitable offices for its use, and shall have authority to procure all necessary office supplies. Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

All of the expenses of the Commission, including all necessary expenses for transportation incurred by the Commissioners, or by their employees under their orders, in making any investigation, or upon official business in any other places than in the city of Washington, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman of the Commission.

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§ 19. Officers of the commission.

[See generally Chapters II and XXI, *supra*.]

Sec. 19. That the principal office of the Commission shall be in the city of Washington, where its general sessions shall be held; but whenever the convenience of the public or the parties may be promoted, or delay or expense prevented thereby, the Commission may hold special sessions in any part of the United States. It may, by one or more of the Commissioners, prosecute any inquiry necessary to its duties, in any part of the United States, into any matter or question of fact pertaining to the business of any common carrier subject to the provisions of this Act.

§ 19a. Valuation of carrier's property.

[See generally Chapters VI and XX, *supra*.]

Sec. 19a. That the Commission shall, as hereinafter provided, investigate, ascertain, and report the value of all the property owned or used by every common carrier subject to the provisions of this Act. To enable the Commission to make such investigation and report, it is authorized to employ such experts and other assistants as may be necessary. The Commission may appoint examiners who shall have power to administer oaths, examine witnesses, and take testimony. The Commission shall make an inventory which shall list the property of every common carrier subject to the provisions of this Act in detail, and show the value thereof as hereinafter provided, and shall classify the physical property, as nearly as practicable, in conformity with the classification of expenditures for road and equipment, as prescribed by the Interstate Commerce Commission.

First. In such investigation said Commission shall ascertain and report in detail as to each piece of property owned or used by said common carrier for its purposes as a common carrier, the original cost to date, the cost of reproduction new, the cost of reproduction less depreciation, and an analysis of the methods by which these several costs are obtained, and the reason for their differences, if any. The Commission shall in like manner ascertain and report separately other values, and elements of value, if any, of the property of such common carrier, and an analysis of the methods of valuation employed, and of the reasons for any differences between any such value, and each of the foregoing cost values.

Second. Such investigation and report shall state in detail and separately from improvements the original cost of all lands, rights of way, and terminals owned or used for the purposes of a common carrier, and ascertained as of the time of dedication to public use, and the present value of the same, and separately the original and present cost of condemnation and damages or of purchase in excess of such original cost or present value.

Third. Such investigation and report shall show separately the property held for purposes other than those of a common carrier, and the original cost and present value of the same, together with an analysis of the methods of valuation employed.

Fourth. In ascertaining the original cost to date of the property of such common carrier the Commission, in addition to such other elements as it may deem necessary, shall investigate and report upon the history and organiza-

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tion of the present and of any previous corporation operating such property; upon any increases or decreases of stocks, bonds, or other securities, in any reorganization; upon moneys received by any such corporation by reason of any issues of stocks, bonds, or other securities; upon the syndicating, banking, and other financial arrangements under which such issues were made and the expense thereof; and upon the net and gross earnings of such corporations; and shall also ascertain and report in such detail as may be determined by the Commission upon the expenditure of all moneys and the purposes for which the same were expended.

Fifth. The Commission shall ascertain and report the amount and value of any aid, gift, grant of right of way, or donation, made to any such common carrier, or to any previous corporation operating such property, by the Government of the United States or by any State, county, or municipal government, or by individuals, associations, or corporations; and it shall also ascertain and report the grants of land to any such common carrier, or any previous corporation operating such property, by the Government of the United States, or by any State, county, or municipal government, and the amount of money derived from the sale of any portion of such grants and the value of the unsold portion thereof at the time acquired and at the present time, also, the amount and value of any concession and allowance made by such common carrier to the Government of the United States, or to any State, county, or municipal government in consideration of such aid, gift, grant, or donation.

Except as herein otherwise provided, the Commission shall have power to prescribe the method of procedure to be followed in the conduct of the investigation, the form in which the results of the valuation shall be submitted, and the classification of the elements that constitute the ascertained value, and such investigation shall show the value of the property of every common carrier as a whole and separately the value of its property in each of the several States and Territories and the District of Columbia, classified and in detail as herein required.

Such investigation shall be commenced within sixty days after the approval of this Act and shall be prosecuted with diligence and thoroughness, and the result thereof reported to Congress at the beginning of each regular session thereafter until completed.

Every common carrier subject to the provisions of this Act shall furnish to the Commission or its agents from time to time and as the Commission may require maps, profiles, contracts, reports of engineers, and any other documents, records, and papers, or copies of any or all of the same, in aid of such investigation and determination of the value of the property of said common carrier, and shall grant to all agents of the Commission free access to its right of way, its property, and its accounts, records, and memoranda whenever and wherever requested by any such duly authorized agent, and every common carrier is hereby directed and required to co-operate with and aid the Commission in the work of the valuation of its property in such further particulars and to such extent as the Commission may require and direct, and all rules and regulations made by the Commission for the purpose of administering the provisions of this section and section twenty of this Act

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shall have the full force and effect of law. Unless otherwise ordered by the Commission, with the reasons therefor, the records and data of the Commission shall be open to the inspection and examination of the public.

Upon the completion of the valuation herein provided for the Commission shall thereafter in like manner keep itself informed of all extensions and improvements or other changes in the condition and value of the property of all common carriers, and shall ascertain the value thereof, and shall from time to time, revise and correct its valuations, showing such revision and correction classified and as a whole and separately in each of the several States and Territories and the District of Columbia, which valuations, both original and corrected, shall be tentative valuations and shall be reported to Congress at the beginning of each regular session.

To enable the Commission to make such changes and corrections in its valuations of each class of property, every common carrier subject to the provisions of this Act shall make such reports and furnish such information as the Commission may require.

Whenever the Commission shall have completed the tentative valuation of the property of any common carrier, as herein directed, and before such valuation shall become final, the Commission shall give notice by registered letter to the said carrier, the Attorney General of the United States, the governor of any State in which the property so valued is located, and to such additional parties as the Commission may prescribe, stating the valuation placed upon the several classes of property of said carrier, and shall allow thirty days in which to file a protest of the same with the Commission. If no protest is filed within thirty days, said valuation shall become final as of the date thereof.

If notice of protest is filed the Commission shall fix a time for hearing the same, and shall proceed as promptly as may be to hear and consider any matter relative and material thereto which may be presented in support of any such protest so filed as aforesaid. If after hearing any protest of such tentative valuation under the provisions of this Act the Commission shall be of the opinion that its valuation should not become final, it shall make such changes as may be necessary, and shall issue an order making such corrected tentative valuation final as of the date thereof. All final valuations by the Commission and the classification thereof shall be published and shall be prima facie evidence of the value of the property in all proceedings under the Act to regulate commerce as of the date of the fixing thereof, and in all judicial proceedings for the enforcement of the Act approved February fourth, eighteen hundred and eighty-seven, commonly known as "the Act to regulate commerce," and the various Acts amendatory thereof, and in all judicial proceedings brought to enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission.

If upon the trial of any action involving a final value fixed by the Commission, evidence shall be introduced regarding such value which is found by the court to be different from that offered upon the hearing before the Commission, or additional thereto and substantially affecting said value, the court, before proceeding to render judgment shall transmit a copy of such evidence to the Commission, and shall stay further proceedings in said action

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for such time as the court shall determine from the date of such transmission. Upon the receipt of such evidence the Commission shall consider the same and may fix a final value different from the one fixed in the first instance, and may alter, modify, amend or rescind any order which it has made involving said final value, and shall report its action thereon to said court within the time fixed by the court. If the Commission shall alter, modify, or amend its order, such altered, modified, or amended order shall take the place of the original order complained of and judgment shall be rendered thereon as though made by the Commission in the first instance. If the original order shall not be rescinded or changed by the Commission, judgment shall be rendered upon such original order.

The provisions of this section shall apply to receivers of carriers and operating trustees. In case of failure or refusal on the part of any carrier, receiver, or trustee to comply with all the requirements of this section and in the manner prescribed by the Commission such carrier, receiver, or trustee shall forfeit to the United States the sum of five hundred dollars for each such offense and for each and every day of the continuance of such offense, such forfeitures to be recoverable in the same manner as other forfeitures provided for in section sixteen of the Act to regulate commerce.

That the district courts of the United States shall have jurisdiction, upon the application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this section by any common carrier, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of this section.

It shall be the duty of every common carrier by railroad whose property is being valued under the Act of March first, nineteen hundred and thirteen, to transport the engineers, field parties, and other employees of the United States who are actually engaged in making surveys and other examination of the physical property of said carrier necessary to execute said Act from point to point on said railroad as may be reasonably required by them in the actual discharge of their duties; and, also, to move from point to point and store at such points as may be reasonably required the cars of the United States which are being used to house and maintain said employees; and, also, to carry the supplies necessary to maintain said employees and the other property of the United States actually used on said railroad in said work of valuation. The service above required shall be regarded as a special service and shall be rendered under such forms and regulations and for such reasonable compensation as may be prescribed by the Interstate Commerce Commission and as will insure an accurate record and account of the service rendered by the railroad, and such evidence of transportation, bills of lading, and so forth, shall be furnished to the Commission as may from time to time be required by the Commission.

§ 20. Reports and accounts of carriers.

[See generally Chapters VIII and XX, *supra*.]

SEC. 20. (*As amended June 29, 1908, February 25, 1909, and June 18, 1910.*)

That the Commission is hereby authorized to require annual reports from all

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common carriers subject to the provisions of this Act, and from the owners of all railroads engaged in interstate commerce as defined in this Act, to prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the Commission may need information. Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises, and equipments; the number of employees and the salaries paid each class; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts affecting the same as the Commission may require; and the Commission may, in its discretion, for the purpose of enabling it the better to carry out the purposes of this Act, prescribe a period of time within which all common carriers subject to the provisions of this Act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept.

Said detailed reports shall contain all the required statistics for the period of twelve months ending on the thirtieth day of June in each year, or on the thirty-first day of December in each year if the Commission by order substitute that period for the year ending June thirtieth, and shall be made out under oath and filed with the Commission at its office in Washington within three months after the close of the year for which the report is made, unless additional time be granted in any case by the Commission; and if any carrier, person, or corporation subject to the provisions of this Act shall fail to make and file said annual reports within the time above specified, or within the time extended by the Commission, for making and filing the same, or shall fail to make specific answer to any question authorized by the provisions of this section within thirty days from the time it is lawfully required so to do, such party shall forfeit to the United States the sum of one hundred dollars for each and every day it shall continue to be in default with respect thereto. The Commission shall also have authority by general or special orders to require said carriers, or any of them, to file monthly reports of earnings and expenses, and to file periodical or special, or both periodical and special, reports concerning any matters about which the Commission is authorized or required by this or any other law to inquire or to keep itself informed or which it is required to enforce; and such periodical or special reports shall be under oath whenever the Commission so requires; and if any such carrier shall fail to make and file any such periodical or special report within the time fixed by the Commission, it shall be subject to the forfeitures last above provided.

Said forfeitures shall be recovered in the manner provided for the recovery of forfeitures under the provisions of this Act.

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The oath required by this section may be taken before any person authorized to administer an oath by the laws of the State in which the same is taken.

The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this Act, including the accounts, records, and memoranda of the movement of traffic as well as the receipts and expenditures of moneys. The Commission shall at all times have access to all accounts, records, and memoranda kept by carriers subject to this Act, and it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, and it may employ special agents or examiners, who shall have authority under the order of the Commission to inspect and examine any and all accounts, records, and memoranda kept by such carriers. This provision shall apply to receivers of carriers and operating trustees.

In case of failure or refusal on the part of any such carrier, receiver, or trustee to keep such accounts, records, and memoranda on the books and in the manner prescribed by the Commission, or to submit such accounts, records, and memoranda as are kept to the inspection of the Commission or any of its authorized agents or examiners, such carrier, receiver, or trustee shall forfeit to the United States the sum of five hundred dollars for each such offense and for each and every day of the continuance of such offense, such forfeitures to be recoverable in the same manner as other forfeitures provided for in this Act.

Any person who shall willfully make any false entry in the accounts of any book of accounts or in any record or memoranda kept by a carrier, or who shall willfully destroy, mutilate, alter, or by any other means or device falsify the record of any such account, record, or memoranda, or who shall willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the carrier's business, or shall keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, shall be deemed guilty of a misdemeanor, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than one thousand dollars nor more than five thousand dollars or imprisonment for a term not less than one year nor more than three years, or both such fine and imprisonment: *Provided*, That the Commission may in its discretion issue orders specifying such operating, accounting, or financial papers, records, books, blanks, tickets, stubs, or documents of carriers which may, after a reasonable time, be destroyed, and prescribing the length of time such books, papers, or documents shall be preserved.

Any examiner who divulges any fact or information which may come to his knowledge during the course of such examination, except in so far as he may be directed by the Commission or by a court or judge thereof, shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not more than five thousand dollars or imprisonment for a term not exceeding two years, or both.

That the circuit and district courts of the United States shall have juris-

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diction, upon the application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of said Act to regulate commerce or of any Act supplementary thereto or amendatory thereof by any common carrier, to issue a writ or writs of mandamus commanding such common carrier, to comply with the provisions of said Acts, or any of them.

And to carry out and give effect to the provisions of said Acts, or any of them, the Commission is hereby authorized to employ special agents or examiners who shall have power to administer oaths, examine witnesses, and receive evidence.

That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: *Provided*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof.

No suit brought in any State court of competent jurisdiction against a railroad company, or other corporation, or person, engaged in and carrying on the business of a common carrier, to recover damages for delay, loss of, or injury to property received for transportation by such common carrier under section twenty of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, as amended June twenty-ninth, nineteen hundred and six, April thirteenth, nineteen hundred and eight, February twenty-fifth, nineteen hundred and nine, and June eighteenth, nineteen hundred and ten, shall be removed to any court of the United States where the matter in controversy does not exceed, exclusive of interest and costs, the sum or value of \$3,000.

§ 21. Annual reports of the commission.

[See generally Chapters II and XXI, *supra*.]

SEC. 21. (*As amended March 2, 1889.*) That the Commission shall, on or before the first day of December in each year, make a report, which shall be transmitted to Congress, and copies of which shall be distributed as are the other reports transmitted to Congress. This report shall contain such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of com-

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merce, together with such recommendations as to additional legislation relating thereto as the Commission may deem necessary; and the names and compensation of the persons employed by said Commission.

§ 22. Carriage free or at reduced rates.

[See generally Chapters XIII and XIV, *supra*.]

SEC. 22. (*As amended March 2, 1889, and February 8, 1895.*) [*See section 1, 5th par.*] That nothing in this Act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this Act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Orphan Homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes; nothing in this Act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; and nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies: *Provided*, That no pending litigation shall in any way be affected by this Act: *Provided further*, That nothing in this Act shall prevent the issuance of joint interchangeable five-thousand-mile tickets, with special privileges as to the amount of free baggage that may be carried under mileage tickets of one thousand or more miles. But before any common carrier, subject to the provisions of this Act, shall issue any such joint interchangeable mileage tickets with special privileges, as aforesaid, it shall file with the Interstate Commerce Commission copies of the joint tariffs of rates, fares, or charges on which such joint interchangeable mileage tickets are to be based, together with specifications of the amount of free baggage permitted to be carried under such tickets, in the same manner as common carriers are required to do with regard to other joint rates by section six of this Act; and all the provisions of said section six relating to joint rates, fares, and charges shall be observed by said common carriers and enforced by the Interstate Commerce Commission as fully with regard to such joint interchangeable mileage tickets as with regard to other joint rates, fares, and charges referred to in said section six. It shall be unlawful for any common carrier that has issued or authorized to be issued any such joint interchangeable mileage tickets to demand, collect, or receive from any person or persons a greater or less compensation for transportation of persons or baggage under such joint interchangeable mileage tickets than that required by the rate, fare, or charge specified in the copies of the joint tariff of rates, fares, or charges filed with the Commission in force at the

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time. The provisions of section ten of this Act shall apply to any violation of the requirements of this proviso.

§ 23. Jurisdiction of the courts.

[See generally Chapters XXIII and XXIV, *supra*.]

Sec. 23. (*Added March 2, 1889.*) That the circuit and district courts of the United States shall have jurisdiction upon the relation of any person or persons, firm, or corporation, alleging such violation by a common carrier, of any of the provisions of the Act to which this is a supplement and all Acts amendatory thereof, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ: *Provided*, That if any question of fact as to the proper compensation to the common carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper, pending the determination of the question of fact: *Provided*, That the remedy hereby given by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by this Act or the Act to which it is a supplement.

§ 24. General powers of the commission.

[See generally Chapters II and XXI, *supra*.]

Sec. 24. (*Added June 29, 1906.*) That the Interstate Commerce Commission is hereby enlarged so as to consist of seven members with terms of seven years, and each shall receive ten thousand dollars compensation annually. The qualifications of the Commissioners and the manner of the payment of their salaries shall be as already provided by law. Such enlargement of the Commission shall be accomplished through appointment by the President, by and with the advice and consent of the Senate, of two additional Interstate Commerce Commissioners, one for a term expiring December thirty-first, nineteen hundred and eleven, one for a term expiring December thirty-first, nineteen hundred and twelve. The terms of the present Commissioners, or of any successor appointed to fill a vacancy caused by the death or resignation of any of the present Commissioners, shall expire as heretofore provided by law. Their successors and the successors of the additional Commissioners herein provided for shall be appointed for the full terms of seven years, except that any person appointed to fill a vacancy shall be appointed only for the unexpired term of the Commissioner whom he shall succeed. Not more than four Commissioners shall be appointed from the same political party.

(*Additional provisions in Act of June 29, 1906.*) (Sec. 9.) That all existing laws relating to the attendance of witnesses and the production of evidence and the compelling of testimony under the Act to regulate commerce and all

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Acts amendatory thereof shall apply to any and all proceedings and hearings under this Act.

(Sec. 10.) That all laws and parts of laws in conflict with the provisions of this Act are hereby repealed; but the amendments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law.

(Sec. 11.) That this Act shall take effect and be in force from and after its passage.

Joint resolution of June 30, 1906, provides: "That the Act entitled 'An Act to amend an Act entitled "An Act to regulate Commerce," approved February 4, 1887, and all Acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission,' shall take effect and be in force sixty days after its approval by the President of the United States."

§ 24a. Service of process in Washington.

(*Additional provisions in Act of June 18, 1910.*) (Sec. 6, par. 2.) It shall be the duty of every common carrier subject to the provisions of this Act, within sixty days after the taking effect of this Act, to designate in writing an agent in the city of Washington, District of Columbia, upon whom service of all notices and processes may be made for and on behalf of said common carrier in any proceeding or suit pending before the Interstate Commerce Commission or before said Commerce Court, and to file such designation in the office of the secretary of the Interstate Commerce Commission, which designation may from time to time be changed by like writing similarly filed; and thereupon service of all notices and processes may be made upon such common carrier by leaving a copy thereof with such designated agent at his office or usual place of residence in the city of Washington, with like effect as if made personally upon such common carrier, and in default of such designation of such agent, service of any notice or other process in any proceeding before said Interstate Commerce Commission or Commerce Court may be made by posting such notice or process in the office of the secretary of the Interstate Commerce Commission.

(Sec. 15.) That nothing in this Act contained shall undo or impair any proceedings heretofore taken by or before the Interstate Commerce Commission or any of the acts of said Commission; and in any cases, proceedings, or matters now pending before it, the Commission may exercise any of the powers hereby conferred upon it, as would be proper in cases, proceedings, or matters hereafter initiated and nothing in this Act contained shall operate to release or affect any obligation, liability, penalty, or forfeiture heretofore existing against or incurred by any person, corporation, or association.

(Sec. 18.) That this Act shall take effect and be in force from and after the expiration of sixty days after its passage, except as to sections twelve and sixteen, which sections shall take effect and be in force immediately.

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DISTRICT COURT JURISDICTION ACT

[See generally Chapters II and XXIV, *supra*]

§ 1. Repeal of Commerce Court Act.

The Commerce Court, created and established by the Act entitled "An Act to create a Commerce Court and to amend the Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, as heretofore amended, and for other purposes," approved June eighteenth, nineteen hundred and ten, is abolished from and after December thirty-first, nineteen hundred and thirteen, and the jurisdiction vested in said Commerce Court by said Act is transferred to and vested in the several district courts of the United States, and all Acts or parts of Acts in so far as they relate to the establishment of the Commerce Court are repealed. Nothing herein contained shall be deemed to affect the tenure of any of the judges now acting as circuit judges by appointment under the terms of said Act, but such judges shall continue to act under assignment, as in the said Act provided, as judges of the district courts and circuit courts of appeals; and in the event of and on the death, resignation, or removal from office of any of such judges, his office is hereby abolished and no successor to him shall be appointed.

The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the Commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the Commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such transportation relates to a through shipment the term "destination" shall be construed as meaning final destination of such shipment.

§ 2. Procedure in district courts.

The procedure in the district courts in respect to cases of which jurisdiction is conferred upon them by this Act shall be the same as that heretofore prevailing in the Commerce Court. The orders, writs, and processes of the district courts may in these cases run, be served, and be returnable anywhere in the United States; and the right of appeal from the district courts in such cases shall be the same as the right of appeal heretofore prevailing under

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existing law from the Commerce Court. No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and to such other persons as may be defendants in the suit: *Provided*, That in cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or in part, of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for the order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said Commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply. A final judgment or decree of the district court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. And in such case the notice required shall be served upon the defendants in the case and upon the Attorney General of the State. All cases pending in the Commerce Court at the date of the passage of this Act shall be deemed pending in and be transferred forthwith to said district courts except cases which may previously have been submitted to that court for final decree and the latter to be transferred to the district courts if not decided by the Commerce Court before December first, nineteen hundred and thirteen, and all

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cases wherein injunctions or other orders or decrees, mandatory or otherwise, have been directed or entered prior to the abolition of the said court shall be transferred forthwith to said district courts, which shall have jurisdiction to proceed therewith and to enforce said injunctions, orders, or decrees. Each of said cases and all the records, papers, and proceedings shall be transferred to the district court wherein it might have been filed at the time it was filed in the Commerce Court if this Act had then been in effect; and if it might have been filed in any one of two or more district courts it shall be transferred to that one of said district courts which may be designated by the petitioner or petitioners in said case, or, upon failure of said petitioners to act in the premises within thirty days after the passage of this Act, to such one of said district courts as may be designated by the judges of the Commerce Court. The judges of the Commerce Court shall have authority, and are hereby directed, to make any and all orders and to take any other action necessary to transfer as aforesaid the cases and all the records, papers, and proceedings then pending in the Commerce Court to said district courts. All administrative books, dockets, files, and all papers of the Commerce Court not transferred as part of the record of any particular case shall be lodged in the Department of Justice. All furniture, carpets, and other property of the Commerce Court is turned over to the Department of Justice and the Attorney General is authorized to supply such portion thereof as in his judgment may be proper and necessary to the United States Board of Mediation and Conciliation.

Any case hereafter remanded from the Supreme Court which, but for the passage of this Act, would have been remanded to the Commerce Court, shall be remanded to a district court, designated by the Supreme Court, wherein it might have been instituted at the time it was instituted in the Commerce Court if this Act had then been in effect, and thereafter such district court shall take all necessary and proper proceedings in such case in accordance with law and such mandate, order, or decree therein as may be made by said Supreme Court.

All laws or parts of laws inconsistent with the foregoing provisions relating to the Commerce Court, are repealed.

Public, No. 32 approved October 22, 1913.

APPENDIX C

COMPULSORY TESTIMONY AND IMMUNITY ACTS

[See generally Chapters XXI and XXIII, *supra*]

§ 1. Giving of testimony compulsory.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the Commission, whether such subpoena be signed or issued by one or more Commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the Act of Congress, entitled "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, or of any amendment thereof on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding: *Provided*, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, tariffs, contracts, agreements and documents, if in his power to do so, in obedience to the subpoena or lawful requirement of the Commission shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by fine not less than one hundred dollars nor more than five thousand dollars, or by imprisonment for not more than one year or by both such fine and imprisonment.

Public, No. 54, approved February 11, 1893.

§ 2. Immunity of witnesses provided.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That under the immunity provisions in the Act entitled "An Act in relation to testimony before the Interstate Commerce Commission," and so forth, approved February eleventh, eighteen hundred and ninety-three, in section six of the Act entitled "An Act to establish the Department of Commerce and Labor," approved February fourteenth, nineteen hundred and three, and in the Act entitled "An Act to further regulate commerce with foreign nations and among the States," approved Febru-

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ary nineteenth, nineteen hundred and three, and in the Act entitled "An Act making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June thirtieth, nineteen hundred and four, and for other purposes," approved February twenty-fifth, nineteen hundred and three, immunity shall extend only to a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath.

Public, No. 389, approved June 30, 1906.

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ELKINS ACT

[See generally Chapters II, XIII, XIV and XXIV, *supra*]

§ 1. Liabilities of carriers and their officers.

SEC. 1. (*As amended June 29, 1906.*) That any thing done or omitted to be done by a corporation common carrier, subject to the Act to regulate commerce and the Acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said Acts or under this Act, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said Acts or by this Act with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said Acts to file and publish the tariffs or rates and charges as required by said Acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars: *Provided*, That any person, or any officer or director of any corporation subject to the provisions of this Act, or the Act to regulate commerce and the Acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have

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been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate commerce or Acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this Act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act.

Any person, corporation, or company who shall deliver property for interstate transportation to any common carrier, subject to the provisions of this Act, or for whom as consignor or consignee, any such carrier shall transport property from one State, Territory, or the District of Columbia to any other State, Territory, or the District of Columbia, or foreign country, who shall knowingly by employee, agent, officer, or otherwise, directly or indirectly, by or through any means or device whatsoever, receive or accept from such common carrier any sum of money or any other valuable consideration as a rebate or offset against the regular charges for transportation of such property, as fixed by the schedules of rates provided for in this Act, shall in addition to any penalty provided by this Act forfeit to the United States a sum of money three times the amount of money so received or accepted and three times the value of any other consideration so received or accepted, to be ascertained by the trial court; and the Attorney General of the United States is authorized and directed, whenever he has reasonable grounds to believe that any such person, corporation, or company has knowingly received or accepted from any such common carrier any sum of money or other valuable consideration as a rebate or offset as aforesaid, to institute in any court of the United States of competent jurisdiction a civil action to collect the said sum or sums so forfeited as aforesaid; and in the trial of said action all such rebates or other considerations so received or accepted for a period of six years prior to the commencement of the action, may be included therein, and the amount recovered shall be three times the total amount of money, or three times the total value of such consideration, so received or accepted, or both, as the case may be.

§ 2. Who are parties in interest.

SEC. 2. That in any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce, whether such proceedings be instituted before the Interstate Commerce Commission or be begun originally in any circuit court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regu-

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lation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers.

§ 3. Injunctive relief against discrimination.

SEC. 3. That whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the circuit court of the United States sitting in equity having jurisdiction; and when the act complained of is alleged to have been committed or as being committed in part in more than one judicial district or State, it may be dealt with, inquired of, tried, and determined in either such judicial district or State, whereupon it shall be the duty of the court summarily to inquire into the circumstances, upon such notice and in such manner as the court shall direct and without the formal pleadings and proceedings applicable to ordinary suits in equity, and to make such other persons or corporations parties thereto as the court may deem necessary, and upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs, and process, which said orders, writs, and process may be enforceable as well against the parties interested in the traffic as against the carrier, subject to the right of appeal as now provided by law. It shall be the duty of the several district attorneys of the United States, whenever the Attorney General shall direct, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute such proceedings, and the proceedings provided for by this Act shall not preclude the bringing of suit for the recovery of damages by any party injured, or any other action provided by said Act approved February fourth, eighteen hundred and eighty-seven, entitled "An Act to regulate commerce" and the Acts amendatory thereof. And in proceedings under this Act and the Acts to regulate commerce the said courts shall have the power to compel the attendance of witnesses, both upon the part of the carrier and the shipper, who shall be required to answer on all subjects relating directly or indirectly to the matter in controversy, and to compel the production of all books and papers, both of the carrier and the shipper, which relate directly or indirectly to such transaction; the claim that such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such person from testifying or such corporation producing its books and papers, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence documentary or otherwise in such proceeding: *Provided*, That the provisions of an Act entitled "An Act to expedite the hearing and determination of suits in equity pending or hereafter brought under the Act of July second, eighteen hundred and ninety, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' 'An Act to regulate commerce,' approved Febru-

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any fourth, eighteen hundred and eighty-seven, or any other acts having a like purpose that may be hereafter enacted, approved February eleventh, nineteen hundred and three," shall apply to any case prosecuted under the direction of the Attorney General in the name of the Interstate Commerce Commission.

§ 4. Conflicting laws thereby repealed.

SEC. 4. That all Acts and parts of Acts in conflict with the provisions of this Act are hereby repealed, but such repeal shall not affect causes now pending nor rights which have already accrued, but such causes shall be prosecuted to a conclusion and such rights enforced in a manner heretofore provided by law and as modified by the provisions of this Act.

Public, No. 103, approved February 19, 1903.

APPENDIX E

EXPEDITING ACT

[See generally Chapters XXI and XXIV, *supra*]

§ 1. Expedition of commerce cases.

SEC. 1. (*As amended June 25, 1910.*) That in any suit in equity pending or hereafter brought in any circuit court of the United States under the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety, "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, or any other Acts having a like purpose that hereafter may be enacted, wherein the United States is complainant, the Attorney General may file with the clerk of such court a certificate that, in his opinion, the case is of general public importance, a copy of which shall be immediately furnished by such clerk to each of the circuit judges of the circuit in which the case is pending. Thereupon such case shall be given precedence over others and in every way expedited, and be assigned for hearing at the earliest practicable day, before not less than three of the circuit judges of said court, if there be three or more; and if there be not more than two circuit judges, then before them and such district judge as they may select; or, in case the full court shall not at any time be made up by reason of the necessary absence or disqualification of one or more of the said circuit judges, the justice of the Supreme Court assigned to that circuit or the other circuit judge or judges may designate a district judge or judges within the circuit who shall be competent to sit in said court at the hearing of said suit. In the event the judges sitting in such case shall be equally divided in opinion as to the decision or disposition of said cause, or in the event that a majority of said judges shall be unable to agree upon the judgment, order, or decree finally disposing of said case in said court which should be entered in said cause, then they shall immediately certify that fact to the Chief Justice of the United States, who shall at once designate and appoint some circuit judge to sit with said judges and to assist in determining said cause. Such order of the Chief Justice shall be immediately transmitted to the clerk of the circuit court in which said cause is pending, and shall be entered upon the minutes of said court. Thereupon said cause shall at once be set down for reargument and the parties thereto notified in writing by the clerk of said court of the action of the court and the date fixed for the reargument thereof. The provisions of this section shall apply to all causes and proceedings in all courts now pending, or which may hereafter be brought.

§ 2. Appeal to supreme court.

SEC. 2. That in every suit in equity pending or hereafter brought in any circuit court of the United States under any of said Acts, wherein the United

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States is complainant, including cases submitted but not yet decided, an appeal from the final decree of the circuit court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof: *Provided*, That in any case where an appeal may have been taken from the final decree of a circuit court to the circuit court of appeals before this Act takes effect, the case shall proceed to a final decree therein, and an appeal may be taken from such decree to the Supreme Court in the manner now provided by law.

Public, No. 82, approved February 11, 1903; Public, No. 310, approved June 25, 1910.

APPENDIX F

CLAYTON ANTITRUST ACT

[See generally Chapters VIII and XX, *supra*]

§ 1. Unlawful to work monopoly by discrimination.

SEC. 2. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: *Provided*, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade.

§ 2. All preferential treatment forbidden.

SEC. 3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

§ 3. Acquisition of stock of competitor forbidden.

SEC. 7. That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation

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whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other such common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided*, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

§ 4. All interlocking directorates forbidden.

SEC. 8. That from and after two years from the date of the approval of this Act no person shall at the same time be a director or other officer or employee of more than one bank, banking association or trust company, organized or operating under the laws of the United States, either of which has deposits, capital, surplus, and undivided profits aggregating more than \$5,000,000; and no private banker or person who is a director in any bank or trust company, organized and operating under the laws of a State, having deposits, capital, surplus, and undivided profits aggregating more than \$5,000,000, shall be

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CLAYTON ANTITRUST ACT

[See generally Chapters VIII and XX, *supra*]

§ 1. Unlawful to work monopoly by discrimination.

SEC. 2. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: *Provided*, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade.

§ 2. All preferential treatment forbidden.

SEC. 3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

§ 3. Acquisition of stock of competitor forbidden.

SEC. 7. That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation

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whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other such common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided*, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

§ 4. All interlocking directorates forbidden.

SEC. 8. That from and after two years from the date of the approval of this Act no person shall at the same time be a director or other officer or employee of more than one bank, banking association or trust company, organized or operating under the laws of the United States, either of which has deposits, capital, surplus, and undivided profits aggregating more than \$5,000,000; and no private banker or person who is a director in any bank or trust company, organized and operating under the laws of a State, having deposits, capital, surplus, and undivided profits aggregating more than \$5,000,000, shall be

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eligible to be a director in any bank or banking association organized or operating under the laws of the United States. The eligibility of a director, officer, or employee under the foregoing provisions shall be determined by the average amount of deposits, capital, surplus, and undivided profits as shown in the official statements of such bank, banking association, or trust company filed as provided by law during the fiscal year next preceding the date set for the annual election of directors, and when a director, officer, or employee has been elected or selected in accordance with the provisions of this Act it shall be lawful for him to continue as such for one year thereafter under said election or employment.

No bank, banking association or trust company, organized or operating under the laws of the United States, in any city or incorporated town or village of more than two hundred thousand inhabitants, as shown by the last preceding decennial census of the United States, shall have as a director or other officer or employee any private banker or any director or other officer or employee of any other bank, banking association or trust company located in the same place: *Provided*, That nothing in this section shall apply to mutual savings banks not having a capital stock represented by shares: *Provided further*, That a director or other officer or employee of such bank, banking association, or trust company may be a director or other officer or employee of not more than one other bank or trust company organized under the laws of the United States or any State where the entire capital stock of one is owned by stockholders in the other: *And provided further*, That nothing contained in this section shall forbid a director of class A of a Federal reserve bank, as defined in the Federal Reserve Act from being an officer or director or both an officer and director in one member bank.

That from and after two years from the date of the approval of this Act no person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than \$1,000,000, engaged in whole or in part in commerce, other than banks, banking associations, trust companies and common carriers subject to the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws. The eligibility of a director under the foregoing provision shall be determined by the aggregate amount of the capital, surplus, and undivided profits, exclusive of dividends declared but not paid to stockholders, at the end of the fiscal year of said corporation next preceding the election of directors, and when a director has been elected in accordance with the provisions of this Act it shall be lawful for him to continue as such for one year thereafter.

When any person elected or chosen as a director or officer or selected as an employee of any bank or other corporation subject to the provisions of this Act is eligible at the time of his election or selection to act for such bank or other corporation in such capacity his eligibility to act in such capacity shall not be affected and he shall not become or be deemed amenable to any of the provisions hereof by reason of any change in the affairs of such bank or

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other corporation from whatsoever cause, whether specifically excepted by any of the provisions hereof or not, until the expiration of one year from the date of his election or employment.

§ 5. Mishandling of corporate funds.

SEC. 9. Every president, director, officer or manager of any firm, association or corporation engaged in commerce as a common carrier, who embezzles, steals, abstracts or willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, securities, property or assets of such firm, association or corporation, arising or accruing from, or used in, such commerce, in whole or in part, or willfully or knowingly converts the same to his own use or to the use of another, shall be deemed guilty of a felony and upon conviction shall be fined not less than \$500 or confined in the penitentiary not less than one year nor more than ten years, or both, in the discretion of the court.

Prosecutions hereunder may be in the district court of the United States for the district wherein the offense may have been committed.

That nothing in this section shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof; and a judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution hereunder for the same act or acts.

§ 6. Carrier forbidden purchasing from allied corporations.

SEC. 10. That after two years from the approval of this Act no common carrier engaged in commerce shall have any dealings in securities, supplies or other articles of commerce, or shall make or have any contracts for construction or maintenance of any kind, to the amount of more than \$50,000, in the aggregate, in any one year, with another corporation, firm, partnership, or association when the said common carrier shall have upon its board of directors or as its president, manager or as its purchasing or selling officer, or agent in the particular transaction, any person who is at the same time a director, manager, or purchasing or selling officer of, or who has any substantial interest in, such other corporation, firm, partnership or association, unless and except such purchases shall be made from, or such dealings shall be with, the bidder whose bid is the most favorable to such common carrier, to be ascertained by competitive bidding under regulations to be prescribed by rule or otherwise by the Interstate Commerce Commission. No bid shall be received unless the name and address of the bidder or the names and addresses of the officers, directors and general managers thereof, if the bidder be a corporation, or of the members, if it be a partnership or firm, be given with the bid.

Any person who shall, directly or indirectly, do or attempt to do anything to prevent anyone from bidding or shall do any act to prevent free and fair competition among the bidders or those desiring to bid shall be punished as prescribed in this section in the case of an officer or director.

Every such common carrier having any such transactions or making any such purchases shall within thirty days after making the same file with the Interstate Commerce Commission a full and detailed statement of the transac-

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tion showing the manner of the competitive bidding, who were the bidders, and the names and addresses of the directors and officers of the corporations and the members of the firm or partnership bidding; and whenever the said Commission shall, after investigation or hearing, have reason to believe that the law has been violated in and about the said purchases or transactions it shall transmit all papers and documents and its own views or findings regarding the transaction to the Attorney General.

If any common carrier shall violate this section it shall be fined not exceeding \$25,000; and every such director, agent, manager or officer thereof who shall have knowingly voted for or directed the act constituting such violation or who shall have aided or abetted in such violation shall be deemed guilty of a misdemeanor and shall be fined not exceeding \$5,000, or confined in jail not exceeding one year, or both, in the discretion of the court.

§ 7. Jurisdiction of the commission.

SEC. 11. That authority to enforce compliance with sections two, three, seven and eight of this Act by the persons respectively subject thereto is hereby vested: in the Interstate Commerce Commission where applicable to common carriers, in the Federal Reserve Board where applicable to banks, banking associations and trust companies, and in the Federal Trade Commission where applicable to all other character of commerce, to be exercised as follows:

Whenever the Commission or board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections two, three, seven and eight of this Act, it shall issue and serve upon such person a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The first so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission or board requiring such person to cease and desist from the violation of the law so charged in said complaint. Any person may make application, and upon good cause shown may be allowed by the Commission or board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission or board. If upon such hearing the Commission or board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock held or rid itself of the directors chosen contrary to the provisions of sections seven and eight of this Act, if any there be, in the manner and within the time fixed by said order. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the Commission or board may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

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If such person fails or neglects to obey such order of the Commission or board while the same is in effect, the Commission or board may apply to the circuit court of appeals of the United States, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the Commission or board. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission or board. The findings of the Commission or board as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission or board, the court may order such additional evidence to be taken before the Commission or board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission or board may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

Any party required by such order of the Commission or board to cease and desist from a violation charged may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the Commission or board be set aside. A copy of such petition shall be forthwith served upon the Commission or board, and thereupon the Commission or board forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the Commission or board as in the case of an application by the Commission or board for the enforcement of its order, and the findings of the Commission or board as to the facts, if supported by testimony, shall in like manner be conclusive.

The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the Commission or board shall be exclusive.

Such proceedings in the circuit court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the Commission or board or the judgment of the court to enforce the same shall in any wise relieve or absolve any person from any liability under the antitrust Acts.

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Complaints, orders, and other processes of the Commission or board under this section may be served by anyone duly authorized by the Commission or board, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person; or (c) by registering and mailing a copy thereof addressed to such person at his principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post-office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same.

§ 8. Jurisdiction of the courts.

SEC. 15. That the several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned whether they reside in the district in which the court is held or not, and subpoenas to that end may be served in any district by the marshal thereof.

§ 9. Civil suits for relief.

SEC. 16. That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect

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of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

§ 10. Procedure in the courts.

Sec. 17. That no preliminary injunction shall be issued without notice to the opposite party.

No temporary restraining order shall be granted without notice to the opposite party unless it shall clearly appear from specific facts shown by affidavit or by the verified bill that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every such temporary restraining order shall be indorsed with the date and hour of issuance, shall be forthwith filed in the clerk's office and entered of record, shall define the injury and state why it is irreparable and why the order was granted without notice, and shall by its terms expire within such time after entry, not to exceed ten days, as the court or judge may fix, unless within the time so fixed the order is extended for a like period for good cause shown, and the reasons for such extension shall be entered of record. In case a temporary restraining order shall be granted without notice in the contingency specified, the matter of the issuance of a preliminary injunction shall be set down for a hearing at the earliest possible time and shall take precedence of all matters except older matters of the same character; and when the same comes up for hearing the party obtaining the temporary restraining order shall proceed with the application for a preliminary injunction, and if he does not do so the court shall dissolve the temporary restraining order. Upon two days' notice to the party obtaining such temporary restraining order the opposite party may appear and move the dissolution or modification of the order, and in that event the court or judge shall proceed to hear and determine the motion as expeditiously as the ends of justice may require.

§ 11. Issuance of restraining orders.

Sec. 18. That, except as otherwise provided in section 16 of this Act, no restraining order or interlocutory order of injunction shall issue, except upon the giving of security by the applicant in such sum as the court or judge may deem proper, conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained thereby.

Sec. 19. That every order of injunction or restraining order shall set forth the reasons for the issuance of the same, shall be specific in terms, and shall describe in reasonable detail, and not by reference to the bill of complaint or other document, the act or acts sought to be restrained, and shall be binding only upon the parties to the suit, their officers, agents, servants, employees, and attorneys, or those in active concert or participating with them, and who shall, by personal service or otherwise, have received actual notice of the same.

Public, No. 212, approved October 15, 1914.

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RULES OF PRACTICE

[See generally Chapters XXII and XXIII, *supra*]

I

PUBLIC SESSIONS

Sessions of the Commission for hearing contested cases, including oral arguments, will be held as ordered by the Commission.

The office of the Commission at Washington, D. C., is open each business day from 9 a. m. to 4.30 p. m.

II

PARTIES TO CASES

Any person, firm, company, corporation, or association, mercantile, agricultural, or manufacturing society, body politic or municipal organization, or any common carrier, or the railroad commissioner or commission of any State or Territory, may complain to the Commission of anything done, or omitted to be done, in violation of the provisions of the act to regulate commerce by any common carrier subject to the provisions of said act. If a complaint relates to matters in which two or more carriers, engaged in transportation by continuous carriage or shipment, are interested, the several carriers participating in such carriage or shipment are necessary parties defendant.

If a complaint relates to rates, regulations, or practices of carriers operating different lines, and the object of the proceeding is to secure correction of such rates, regulations, or practices on each of said lines, all the carriers operating such lines should be made defendants.

If a complaint relates to provisions of a classification it will ordinarily be sufficient to name as defendants the principal carriers named as parties to the classification.

If the line of a carrier is operated by a receiver or trustee, both the carrier and its receiver or trustee must be made defendants in cases involving transportation over such line.

Any person may petition in any proceeding for leave to intervene prior to or at the time of the hearing and not after. Such petition shall set forth the petitioner's interest in the proceedings, but intervention will not be permitted, except upon allegations that are reasonably pertinent to the issues of the original complaint. Leave granted on such petition will entitle such interveners to have notice of hearings, to produce and cross-examine witnesses, and to be heard in person or by counsel upon brief and at the oral argument.

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III

COMPLAINTS

Complaints must be in typewriting on one side of the paper only, on paper not more than 8½ inches wide and not more than 12 inches long, and weighing not less than 16 pounds to the ream, folio base, 17 by 22 inches, with left-hand margin not less than 1½ inches wide, setting forth briefly the facts claimed to constitute a violation of the law. Complaints may also be printed in the size designated in Rule XIV regarding briefs. The corporate name of the carrier or carriers complained against must be stated in full without abbreviations, and the address of the complainant, with the name and address of his attorney or counsel, if any, must appear upon each copy of the complaint. The complaint need not be verified, but must be signed in ink by the complainant or his duly authorized attorney. The complainant must furnish as many complete copies of the complaint as there may be parties complained against to be served, including receiver or receivers, and three additional copies for the use of the Commission.

The Commission will serve the complaint upon each defendant by leaving a copy with its agent in the District of Columbia, or, if no such agent has been designated, by posting a copy in the office of the Secretary of the Commission.

Two or more complaints involving the same principle, subject, or state of facts may be included in one complaint. The several rates, regulations, discriminations, and shipments involved should be separately set out. One or more persons may join in one complaint against one or more carriers if the subject-matter of the complaint involves substantially the same principle, subject, or state of facts.

Except under unusual circumstances and for good cause shown, reparation will not be awarded unless specifically prayed for in the complaint or in an amendment thereto filed before the submission of the case.

After a final order has been entered upon a complaint in which reparation is not sought or, if prayed, has been denied, the Commission will not ordinarily award reparation upon a complaint subsequently filed and based upon any finding upon the first complaint.

Where reparation is demanded under a general rate adjustment challenged in the complaint, or upon many shipments under a particular rate, or where many points of origin or destination are involved, it is the practice of the Commission first to determine and make a formal announcement respecting the reasonableness of the rate or rates in issue, and whether the facts justify an award of reparation, giving to the parties thereafter an opportunity to make proof respecting the shipments upon which reparation is claimed. Freight bills and other exhibits must therefore be reserved until such further hearing and must not be filed with the complaint. In such cases the complaint, without unnecessary details, should disclose in general terms the basis and extent of the damages demanded in such manner as reasonably to advise the defendants thereof.

When a claim for reparation has been before the Commission informally and the parties have been notified by the Commission that the claim is of such

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a nature that it can not be determined informally, formal complaint must be filed within six months after such notification, or the parties will be deemed to have abandoned their claim: *Provided, however*, That this rule does not apply to formal complaints for reparation filed within two years from the date of the delivery of the shipments.

IV

ANSWERS

One copy of each answer must, unless the Commission orders otherwise, be filed with the secretary of the Commission at his office in Washington, D. C., within 30 days after the day of service of the complaint by defendants whose general offices are at or west of El Paso, Tex., Salt Lake City, Utah, or Spokane, Wash., and within 20 days by all other defendants, and a copy of each such answer must be at the same time served personally or by mail upon the complainant or his attorney. The Commission will, when advisable, shorten or extend the time for answer. If a defendant satisfies a complaint before answering, a written acknowledgment thereof, showing the character and extent of the satisfaction given, must be filed by the complainant. In such case a statement of the fact and manner of satisfaction without other matter may be filed as answer. If the complaint is satisfied after the filing and service of answer, a written acknowledgment thereof must be filed by the complainant and a supplemental answer setting forth the fact and manner of satisfaction must be filed by the defendant. Answers in typewriting must be on one side of the paper only, on paper not more than 8½ inches wide and not more than 12 inches long and weighing not less than 16 pounds to the ream, folio base, 17 by 22 inches, with left-hand margin not less than 1½ inches wide, or may be printed in the size designated in Rule XIV regarding briefs.

V

MOTION TO DISMISS

A defendant who deems the complaint insufficient to show a breach of legal duty may, instead of answering or formally demurring, serve on the complainant notice of hearing on the complaint: and in such case the facts stated in the complaint will be deemed admitted. A copy of the notice must at the same time be filed with the secretary of the Commission. The filing of an answer, however, will not be deemed an admission of the sufficiency of the complaint, but a motion to dismiss for insufficiency may be made at the hearing.

VI

SERVICE OF PAPERS

Copies of notices or papers, other than complaints, presented by a party must be served upon the adverse party or parties personally or by mail. When any party has appeared by attorney, service upon such attorney will be deemed proper service upon the party.

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VII

AMENDMENTS

Amendments to any complaint or answer in any proceeding or investigation will be allowed by the Commission at its discretion.

VIII

CONTINUANCES AND EXTENSIONS OF TIME

Continuances and extensions of time will be granted at the discretion of the Commission.

IX

STIPULATIONS

Parties to any proceeding may, by stipulation in writing filed with the secretary, agree upon the facts, or any portion thereof, involved therein. It is desired that the facts be thus agreed upon whenever practicable.

X

HEARINGS

Upon issue being joined by service of answer or by notice of hearing on the complaint, or by failure of defendant to answer, the Commission will assign a time and place for hearing. Witnesses will be examined orally before the Commission or one of its examiners, unless their testimony be taken by deposition or the facts be agreed upon as provided for in these rules.

XI

DEPOSITIONS

The deposition of a witness for use in a case pending before the Commission may, after such case is at issue, be taken upon compliance with the following rules of procedure, which are prescribed by the Commission under authority conferred upon it by section 17 of the act, but not otherwise.

Such depositions may be taken before a special agent or examiner of the Commission, or any judge or commissioner of any court of the United States, or any clerk of a district court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the proceeding or investigation, according to such designation as the Commission may make in any order made by it in the premises, except that where such deposition is taken in a foreign country it may be taken before an officer or person designated by the Commission or agreed upon by the parties by stipulation in writing to be filed with the Commission.

Any party desiring to take the deposition of a witness in such a case shall notify the Commission to that effect, and in such notice shall state the time when, the place where, and the name and post-office address of the party be-

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fore whom it is desired the deposition be taken, the name and post-office address of the witness, and the subject-matter or matters concerning which the witness is expected to testify, whereupon the Commission will make and serve upon the parties or their attorneys an order wherein the Commission shall name the witness whose deposition is to be taken and specify the time when, the place where, and the party before whom the witness is to testify, but such time and place, and the party before whom the deposition is to be taken, so specified in the Commission's order, may or may not be the same as those named in said notice to the Commission.

Every person whose deposition is so taken shall be cautioned and take oath (or affirm) to testify the whole truth and nothing but the truth concerning the matter about which he shall testify, and shall be carefully examined. His testimony shall be reduced to typewriting by the officer before whom the deposition is taken, or under his direction, after which the deposition shall be subscribed by the witness and certified in usual form by the officer. After the deposition has been so subscribed and certified it shall, together with two copies thereof made by such officer or under his direction, be forwarded by such officer under seal in an envelope addressed to the Commission at its office in Washington, D. C. Upon receipt of the deposition and copies the Commission will file in the record in said case such deposition and forward one copy to the complainant or his attorney, and the other copy to the defendant or its attorney, except that where there is more than one complainant or defendant the copies will be forwarded by the Commission to the parties designated by such complainants or defendants as the case may be.

Such depositions shall be typewritten on one side only of the paper, which shall be not more than 8½ inches wide and not more than 12 inches long and weighing not less than 16 pounds to the ream, folio base 17 by 22 inches, with left-hand margin not less than 1½ inches wide.

No deposition shall be taken except after 6 days' notice to the parties, and where the deposition is taken in a foreign country such notice shall be at least 15 days.

No such deposition shall be taken either before the case is at issue, or unless under special circumstance and for good cause shown, within 10 days prior to the date of the hearing thereof assigned by the Commission, and where the deposition is taken in a foreign country it shall not be taken after 30 days prior to such date of hearing.

Witnesses whose depositions are taken pursuant to these rules and the magistrate or the officer taking the same, unless he be an examiner of the Commission, shall severally be entitled to the same fees as are paid for like service in the courts of the United States, which fees shall be paid by the party or parties at whose instance the depositions are taken.

XII

WITNESSES AND SUBPENAS

Subpenas requiring the attendance of witnesses from any place in the United States to any designated place of hearing may be issued by any member of the Commission.

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Subpoenas for the production of books, papers, or documents (unless directed to issue by the Commission upon its own motion) will issue only upon application in writing. Applications to compel witnesses not parties to the proceeding to produce documentary evidence must be verified and must specify, as near as may be, the books, papers, or documents desired and the facts to be proven by them. Applications to compel a party to the proceeding to produce books, papers, or documents need only set forth in a general way the books, papers, or documents sought, with a statement that the applicant believes they will be of service in the determination of the case.

Witnesses whose testimony is taken orally are severally entitled to the same fees as are paid for like services in the courts of the United States, such fees to be paid by the party at whose instance the testimony is taken.

XIII

DOCUMENTARY EVIDENCE

Where relevant and material matter offered in evidence is embraced in a document containing other matter not material or relevant and not intended to be put in evidence, such document will not be filed, but the party offering the same shall also present to opposing counsel and to the Commission in proper form for filing copies of such material and relevant matter, and that only shall be filed.

In case any portion of a tariff, report, circular, or other document on file with the Commission is offered in evidence, the party offering the same must give specific reference to the items or pages and lines thereof to be considered. In case any testimony in other proceedings than the one on hearing is introduced in evidence, a copy of such testimony must be presented as an exhibit. When exhibits of a documentary character are offered in evidence, two copies should be furnished at the hearing for the use of the Commission and a copy for each of the principal parties represented.

XIV

BRIEFS

Unless otherwise specifically ordered, briefs may be filed upon application made at hearings or upon order of the Commission. Briefs shall be printed and contain an abstract of the evidence relied upon by the parties filing the same; and in such abstract reference shall be made to the pages of the record wherein the evidence appears. The abstract of evidence should follow the statement of the case and precede the argument. Briefs must be printed in 10 or 12 point type, on good unglazed paper, 5 7-8 inches wide by 9 inches long, with inside margins not less than 1 inch wide, and with double-led text and single-led citations.

At the close of the testimony in each case the presiding commissioner or examiner will fix the time for filing and service of the respective briefs, as follows, unless good cause for variation therefrom is shown: To the complainant, 30 days from date of conclusion of the testimony; to the defendants and interveners, 15 days after the date fixed for the complainant; and to complainant

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for reply brief, 10 days after the date fixed for defendants or interveners. Briefs not filed and served on or before the dates fixed therefor will not be received unless a special order therefor is made by the Commission. All briefs must be filed with the secretary and be accompanied by notice, showing service upon the adverse parties, and 15 copies of each brief shall be furnished for the use of the Commission, unless otherwise ordered. Applications for extension of time in which to file briefs shall be by petition, in writing, stating the facts on which the application rests, which must be filed with the Commission at least five days before the time for filing such brief.

Oral argument will be had only as ordered by the Commission. Applications therefor must be made at the hearing or in writing within 10 days after the completion of proof.

XV

REHEARINGS

Applications for reopening a case after final submission, or for rehearing after decision, must be by petition stating specifically the grounds relied upon; such petition must be served by the party filing same upon the opposing counsel who appeared at the hearing or on brief.

If such application be to reopen the case for further evidence, the nature and purpose of such evidence must be briefly stated, and the same must not be merely cumulative. If the application be for a rehearing, the petition must specify the matters claimed to be erroneously decided, with a brief statement of the alleged errors. If any order of the Commission is sought to be reversed, changed, or modified on account of facts and circumstances arising subsequent to the hearing, or of consequences resulting from compliance therewith, the matters relied upon by the applicant must be fully set forth. At least 10 copies of all such applications must be filed.

XVI

TRANSCRIPTS OF TESTIMONY

One copy of the testimony will be furnished by the Commission for the use of the complainant and one copy for the use of the defendant, without charge. If two or more complainants or defendants have appeared at the hearing, such complainants or defendants must designate to whom the copy for their use shall be delivered.

In proceedings instituted by the Commission on its own motion, including proceedings involving the suspension of tariffs, no free copies of testimony will be furnished.

XVII

COMPLIANCE WITH ORDERS

An order having been issued, the defendant or defendants named therein must promptly notify the secretary of the Commission on or before the date upon which such order becomes effective, whether or not compliance has been made therewith. If a change in rates is required, the notification to the secretary must be given in addition to the filing of proper tariffs.

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XVIII

APPLICATION BY CARRIERS UNDER PROVISIO CLAUSE OF FOURTH SECTION

Any common carrier may apply to the Commission, under the proviso clause of the fourth section, for authority to charge for the transportation of like kind of property less for a longer than for a shorter distance over the same line, in the same direction, the shorter being included within the longer distance or for authority to charge more as a through rate than the aggregate of the intermediate rates subject to the act. Such application shall be by verified petition, which shall specify the places and traffic involved, the rates charged on such traffic for the shorter and longer distances, the carriers other than the petitioner which may be interested in the traffic, the character of the hardship claimed to exist, and the extent of the relief sought by the petitioner. Upon the filing of such a petition, the Commission will take such action as the circumstances of the case seem to require.

XIX

SUSPENSIONS

Suspensions of rates under section 15 of the act to regulate commerce will not ordinarily be made unless request in writing therefor is made at least 10 days before the time fixed in the tariff for such rates to take effect. Requests for suspension must indicate the schedule affected by its I. C. C. number and give specific reference to the parts thereof complained against, together with a statement of the grounds thereof.

XX

INFORMATION TO PARTIES

The Secretary of the Commission will, upon request, advise any party as to the form of complaint, answer, or other paper necessary to be filed in the case.

XXI

ADDRESS OF THE COMMISSION

All communications to the Commission must be addressed to Washington, D. C., unless otherwise specifically directed.

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FORMS OF PROCEDURE

[See generally Chapters XXIII and XXIV, *supra*]

These forms may be used in cases to which they are applicable, with such alterations as the circumstances may render necessary

NO. 1. COMPLAINT [OFFICIAL FORM]

BEFORE THE INTERSTATE COMMERCE COMMISSION

_____ vs. THE _____ RAILROAD COMPANY, _____ RAILWAY COMPANY.	{ (Insert corporate title, without abbreviation, of carrier or carriers) necessary defendants.
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The complaint of the above-named complainant respectfully shows:

I. That (complainant should here state occupation and place of business, also whether it is a corporation, firm, or partnership, and if a firm or partnership, the individual names of the parties composing the same should be given).

II. That the defendant (defendants) above named is a common carrier (are common carriers) engaged in the transportation of passengers and property, wholly by railroad (partly by railroad and partly by water), between points in the State of _____ and points in the State of _____, and as such common carrier (carriers) is (are) subject to the provisions of the act to regulate commerce approved February 4, 1887, and acts amendatory thereof or supplementary thereto.

III. That (state in this and subsequent paragraphs, to be numbered numerically, the matter or matters intended to be complained of, naming every rate, rule, regulation, or practice whose lawfulness is challenged, and also each point of origin and point of destination between which the rates complained of are applied).

[Following this a paragraph or paragraphs should be inserted alleging that by reason of the facts stated in the foregoing paragraphs complainant (complainants) has (have) been subjected to the payment of rates of transportation which were when exacted, and still are, unjust and unreasonable in violation of section 1 of the act to regulate commerce, or unduly discriminatory in violation of sections 2, 3, or 4 thereof.]

Wherefore complainant prays that defendants may be severally required to answer the charges herein; that after due hearing and investigation an order be made commanding said defendants and each of them to cease and desist from the aforesaid violation of said act to regulate commerce, and establish and put in force and apply as maxima in future to the transportation of _____ between the shipping and destination points named in paragraph _____ hereof, in lieu of the rates named in said paragraph, such other rates as the Commis-

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sion may deem reasonable and just (and also pay to complainants by way of reparation for the unlawful charges hereinbefore described the sum of ———, or such other sum as, in view of the evidence to be adduced herein, the Commission may consider complainant entitled to), and that such other and further order or orders be made as the Commission may consider proper in the premises and complainant's cause may appear to require.

Dated at ———, 19—.

_____,
[Complainant's signature.]

NO. 2. ANSWER [OFFICIAL FORM]

BEFORE THE INTERSTATE COMMERCE COMMISSION

vs.
THE ——— RAILROAD COMPANY }

The above-named defendant, for answer to the complaint in this proceeding, respectfully states:

1. (*Here follow the usual admissions, denials, and averments, answering the complaint paragraph by paragraph.*)

Wherefore the defendant prays that the complaint in this proceeding be dismissed.

THE ——— RAILROAD COMPANY,
By ———,

_____,
[Title of officer.]

NO. 3. COMPLAINT OF UNREASONABLE CHARGES

INTERSTATE COMMERCE COMMISSION

To the Honorable Interstate Commerce Commissioners:

(I.) Your petitioners complain of the Oregon Railway & Navigation Company and respectfully represent: That on the 13th day of June, A. D. 1887, your petitioners shipped from the City of Colfax, in the Territory of Washington, to the City of Portland, in the State of Oregon, two car loads of wheat, to wit: 122 sacks of wheat of the weight of 20,000 pounds on one car, and 230 sacks of wheat of the weight of 30,000 pounds on the other car. That the said two car loads of wheat were loaded on said cars at your petitioners' sole expense, and were delivered to said Oregon Railway & Navigation Company for transportation to Portland, Oregon, as aforesaid, on said 30th day of June, A. D. 1887. That the distance from the said City of Colfax, in Washington Territory, to Portland, Oregon, does not exceed 320 miles. That the said Oregon Railway & Navigation Company, against the protests of your petitioners, have charged your petitioners for transporting the said two car loads of wheat the said 320 miles, the full sum of \$175, or at the rate of \$7 for each ton of 2000 pounds.

(II.) Your petitioners further aver that it is stated in the annual report of the said Oregon Railway & Navigation Company for 1886, that the total cost of all property of every description owned by said Company, including ocean

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steamers, river and sound boats, barges and wharves, is \$32,924,433.72; while its net income from railroad earnings alone was, as appears by the same report, \$2,256,589.78, or 6 8-10 per cent. on the whole nominal investment of that Company, without counting its earnings from other sources. That during the same year that Company transported over its railroad lines 123,413,669 tons of freight and merchandise, and that the average price it received for transporting merchandise from Portland, Oregon, to Colfax, Washington Territory, was in excess of \$30 per ton.

(III.) Your petitioners further allege that the rates recommended by the railroad commissioners of the State of Oregon, for the transportation of wheat from points in the State of Oregon, equi-distant from said Portland, Oregon, with the City of Colfax, in Washington Territory, and reached by the line of the Oregon Railway & Navigation Company, is \$4 per ton, or \$3 per ton less than the said Company has charged your petitioners.

(IV.) Your petitioners further allege that the said Oregon Railway & Navigation Company has agreed to make a rate from points in Columbia county, Washington Territory, as far from Portland, Oregon, as is the City of Colfax, for the transportation of wheat and other grains over the line of said railroad to said Portland, Oregon, of \$5 per ton, while still continuing the rate from said Colfax at \$7 per ton, thus charging your petitioners, and all other handlers of grain in Colfax, \$2 per ton more for transporting their wheat the same distance than is charged the wheat raisers and buyers shipping from said points in Columbia county.

(V.) And your petitioners further allege that the sum of \$7 per ton for the transportation of wheat as aforesaid from Colfax, Washington Territory, to Portland, Oregon, is unjust and unreasonable; and that a just and reasonable charge for such transportation is \$3.50 per ton, which is approximately the rate fixed for a haul of the same distance by the Illinois State law.

(VI.) Wherefore, your petitioners pray that you may direct the said Oregon Railway & Navigation Company to reimburse to your petitioners the sum of \$87.50, the sum paid by your petitioners to the said Oregon Railway & Navigation Company for the transportation of said two car loads of wheat to Portland, Oregon, in excess of a just and reasonable freight charge. And your petitioners further pray that the said Oregon Railway & Navigation Company may be required to establish a rate for the transportation of grain from Colfax, Washington Territory, to Portland, Oregon, not in excess of \$3.50 per ton.

McCLAIN, WADE & Co.

NO. 4. COMPLAINT OF WRONG CLASSIFICATION

INTERSTATE COMMERCE COMMISSION

NATIONAL MACHINERY AND WRECKING Co.

v.

PITTSBURG, CINCINNATI, CHICAGO & ST. LOUIS RY. *et al.*

The petition of the above-named complainant respectfully shows:

(I.) That complainant is a partnership composed of Jacob W. and Milton S. Kohn, in the State of Ohio, having its principal office and place of business

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in the city of Cleveland, in said State, and is a dealer in boilers, generators, motors and other machines, shipping the same, new and second-hand, between points lying in different States of the United States, particularly in those States lying in Official Classification territory, which is generally described as that territory lying north of the Potomac and Ohio and east of the Mississippi rivers.

(II.) That the above-named defendants are common carriers engaged in the transportation of property by railroad between points in different States of the United States, and largely in said Official Classification territory, and as such common carriers are subject to the provisions of the Act to Regulate Commerce, approved February 4, 1887, and acts amendatory thereof or supplementary thereto.

(III.) That complainant, in the course of its business, ships over defendants' lines of railroad old and second-hand dynamos from points in other States to Cleveland, where they are converted into junk. That in Official Classification No. 26, dated January 2, 1905, adopted by defendants and now enforced upon their lines, dynamos, new or second-hand, boxed or on skids, crated, are classified at first class and take first-class rates over defendants' lines. That by such classification and rating defendants compel complainant to pay on its shipments of old and second-hand dynamos, which are practically worthless, the first-class rate, which is the same as is charged on new and valuable dynamos. That said rating of second-hand dynamos in the same class as new dynamos is unreasonable, unduly discriminatory, and should be changed. That the classification of second-hand or defective dynamos should be the same as that applied to junk in Official Classification, to wit, sixth class, which affords sufficient compensation for the transportation service performed, because such second-hand dynamos have no more value than the metal contained in them.

(IV.) That the wrongful classification and rating above set forth results in unreasonable and unjust transportation charges on complainant's shipments of second-hand dynamos in Official Classification territory, in violation of section one of said Act to Regulate Commerce, and subjects complainant and other shippers of second-hand dynamos, and their traffic, within the Official Classification territory, to unjust discrimination and undue and unreasonable prejudice and disadvantage, in violation of sections two and three of said Act to Regulate Commerce.

(V.) That on or about the 5th day of October, 1905, complainant had shipped to it from Marietta, Georgia, one second-hand dynamo, weighing 6,300 pounds, and costing complainant \$85.00, which was delivered by connections to the defendant, the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company, at Cincinnati, Ohio, and transported thence by said defendant to Columbus, Ohio, thence via the Cleveland, Akron & Columbus Railway Company to Hudson, Ohio, and thence via the Pennsylvania Company to complainant at Cleveland, Ohio. That said shipment was billed out as "one box of scrap iron" and complainant expected it to take the scrap-iron rate of 65 cents per 100 pounds; but before delivery the rate was advanced to the rate on new dynamos of \$1.33 per 100 pounds. That complainant was compelled to pay the unjust and unreasonable rate of \$1.33 per 100 pounds for

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the transportation of such shipment, aggregating the sum of \$83.79, instead of the just and reasonable rate of 65 cents per 100 pounds, aggregating the sum of \$40.95. That by reason of said unjust classification complainant was compelled to pay an excess charge of \$42.84, for which reparation is claimed.

Wherefore, complainant prays that defendants may be required to answer the charges herein; that after due hearing and investigation an order be made requiring the defendants, the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company, the Cleveland, Akron & Columbus Railway Company, and the Pennsylvania Company, to pay to complainant the sum of \$42.84, or such other sum as, upon the proof to be adduced, the Commission may find complainant entitled to; and requiring all the defendants herein mentioned to wholly cease and desist from the aforesaid violation of said Act to Regulate Commerce; and that such other and further order or orders may be entered as the Commission may deem necessary in the premises and complainant's cause may appear to require.

Dated at Cleveland, Ohio, _____, 1905.

NATIONAL MACHINERY AND WRECKING COMPANY.

No. 5. NOTICE BY CARRIER UNDER RULE V

INTERSTATE COMMERCE COMMISSION

vs.
THE _____ RAILROAD COMPANY. }

Notice is hereby given under Rule V of the Rules of Practice in proceedings before the Commission that a hearing is desired in this proceeding upon the facts as stated in the complaint.

THE _____ RAILROAD COMPANY,
By _____,
[Title of officer]

No. 6. SUSPENSION OF RATE ADVANCE

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 25th day of March, A. D., 1913

INVESTIGATION AND SUSPENSION DOCKET NO. 229

BANGOR & AROOSTOCK RAILROAD JOINT RATE CANCELLATION

IT APPEARING, That there has been filed with the Interstate Commerce Commission by C. J. Pierce, as agent for the carriers named in his tariff I. C. C. No. 15, as amended, tariffs containing schedules stating new individual and joint rates and charges, and new individual and joint regulations and practices affecting such rates and charges, to become effective the 1st day of April, 1913, designated as follows:

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C. J. PIERCE, AGENT,

Supplement No. 11 to I. C. C. No. 15.

Supplement No. 12 to I. C. C. No. 15.

IT IS ORDERED, That the Commission upon complaint without formal pleading, enter upon a hearing concerning the propriety of the advances and the lawfulness of the rates, charges, regulations and practices stated in the schedules contained in said tariffs.

IT FURTHER APPEARING, That said schedules make certain advances in rates for the interstate transportation of news printing paper and the rights and interests of the public appearing to be injuriously affected thereby, and it being the opinion of the Commission that the effective date of the schedules contained in said tariffs, should be postponed pending said hearing and decision thereon:

IT IS FURTHER ORDERED, That the operation of the schedules contained in said tariffs, be suspended, and that the use of the rates, charges, regulations and practices therein stated be deferred upon interstate traffic until the 17th day of July, 1913.

AND IT IS FURTHER ORDERED, That a copy of this order be filed with said schedules in the office of the Interstate Commerce Commission, and that copies thereof be forthwith served upon the carriers parties to said schedules, and upon C. J. Pierce, Agent, and that said carriers parties to said schedules be and they are thereby made respondents to this proceeding, and that they be duly notified of the time and place of the hearing above ordered.

By the Commission:

GEORGE B. MCGINTY,
Secretary.

NO. 7. COMPLAINT OF REFUSING THROUGH SERVICE

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 5733

COLONIAL NAVIGATION COMPANY,	}
Petitioner,	
against	
THE NEW YORK, NEW HAVEN AND	
HARTFORD RAILROAD COMPANY,	
Respondent.	

The petition of the Colonial Navigation Company, the petitioner, respectfully shows and alleges as follows:

(I.) That the petitioner above named is a corporation duly organized and existing under the Laws of the State of New York, and is a common carrier engaged in the transportation of passengers and property by continuous carriage or shipment, wholly by water, between the City of Providence in the State of Rhode Island and the City of New York in the State of New York, and having its principal office at Pier 39 North River, New York City, in the State of New York.

(II.) That the respondent, The New York, New Haven & Hartford Rail-

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road Company, is a common carrier engaged in the transportation of passengers and property by continuous carriage or shipment between the City of Providence in the State of Rhode Island and various cities and towns in the New England States, including the City of Boston, Massachusetts, wholly by railroad, and as such common carrier is subject to the provisions of the Act to Regulate Commerce, approved February 4th, 1887, and Acts amendatory thereof and supplemental thereto, and that the said respondent has its principal office at New Haven, State of Connecticut.

(III.) That The New England Steamship Company is a common carrier engaged in transportation of passengers and property by continuous carriage or shipment wholly by water, between the City of New York in the State of New York, and the City of Providence, Rhode Island, and other New England ports.

IV. That the City of Providence is situated on Narragansett Bay in the State of Rhode Island, and that the said City of Providence is a transfer point at which The New York, New Haven & Hartford Railroad Company transfers passengers and property carried or shipped from the City of Boston, Massachusetts, and other New England cities, to The New England Steamship Company, for carriage or shipment to New York City and other points beyond, and where the said The New York, New Haven & Hartford Railroad Company receives passengers and property from the boats of The New England Steamship Company travelling and proceeding from New York City and other points for carriage and shipment to the City of Boston, Massachusetts, and other New England cities, upon its railroad, and that such transfer is made under through routing agreements or arrangements between the said Railroad Company and the said Steamship Company under through rates and divisions in force between said Railroad Company and Steamship Company.

(V.) That the said Colonial Navigation Company has requested The New York, New Haven & Hartford Railroad Company, in writing, to give to it the same facilities as to through ticketing and routing as granted to The New England Steamship Company, and to join with it in an arrangement for through ticketing of passengers and checking of baggage between the City of New York and the City of Boston and other New England cities located on the line of said Railroad Company via the City of Providence and for the through ticketing of passengers and through checking of baggage between the City of Boston, Massachusetts, and other cities and towns located on the lines of the said Railroad Company in various New England States and via the City of Providence to New York City, and that The New York, New Haven & Hartford Railroad Company has declined and refused to enter into such an agreement with the Colonial Navigation Company and to permit the through routing of passengers and baggage as aforesaid, although the said Colonial Navigation Company is willing to allow to the said New York, New Haven & Hartford Railroad Company as its share of the receipts for such transportation, the full rate published by the said New York, New Haven & Hartford Railroad Company and in force between the City of Providence, R. I., and the City of Boston, Massachusetts, and other New England cities, and although the said Colonial Navigation Company is willing in addition to

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assume all expenses for the transportation of passengers and baggage between its boats and the station of the said New York, New Haven & Hartford Railroad Company, and despite the fact that the said New York, New Haven & Hartford Railroad Company is offering such facilities to through routing and ticketing to the New England Steamship Company as aforesaid, by way of the ports of the City of Providence, R. I., Fall River, Massachusetts, and New London, Connecticut.

(VI.) By reason of the failure and refusal of the New York, New Haven & Hartford Railroad Company to grant such equal facilities and to enter into such agreement for through routing and ticketing, it is and has been subjecting your petitioner to unjust discrimination in violation of sections 1, 2 and 3 of the Act to Regulate Commerce, approved February 4th, 1887, and the acts amendatory thereof and supplemental thereto.

(VII.) That this petitioner has made no previous application to this Commission for relief in the matter, nor is there any action in law or in equity by the petitioner against the respondent now pending, in reference to the same.

WHEREFORE, the petitioner prays that the respondent be required to answer the charge herein, and that after due hearing and investigation, an order be made commanding and directing the said New York, New Haven & Hartford Railroad Company to cease and desist from said violations of the Act to Regulate Commerce as aforesaid, and directing the said respondent to establish a through routing and ticketing in connection with your petitioner's line between the City of New York and the City of Boston and other cities in the New England States, upon the respondent's line or lines of railroad by way of Providence, R. I., for the through ticketing of passengers, through checking of baggage, and providing the terms and conditions upon which such through route shall be operated, and for such other and further order as the Commission may deem just and proper in the premises and petitioner's cause may appear to require.

Dated, New York, April 15th, 1913.

COLONIAL NAVIGATION COMPANY.

STATE OF NEW YORK, }
County of New York. } ss.:

James A. Joy, being duly sworn deposes and says that he is Vice-President of Colonial Navigation Company, the petitioner herein; that he has read the foregoing petition subscribed by him and knows the contents thereof; that the same is true of his own knowledge except as to those matters which are herein stated to be alleged on information and belief, and that as to those matters he believes it to be true. That the reason this verification is made by deponent and not by the complainant is that the petitioner is a corporation, and deponent has personal knowledge of the facts stated in said petition.

JAMES A. JOY.

Sworn before me this
16th day of April, 1913.

C. S. BOSTWICK,
Notary Public No. 410.
New York Co.

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NO. 8. ANSWER OF RESPONDENTS IN THAT PROCEEDING

THE INTERSTATE COMMERCE COMMISSION

Docket No. 5733

COLONIAL NAVIGATION COMPANY }
 vs. }
THE NEW YORK, NEW HAVEN & }
HARTFORD RAILROAD COMPANY. }

ANSWER OF THE RESPONDENT

The New York, New Haven & Hartford Railroad Company

The New York, New Haven & Hartford Railroad Company, the respondent in the above entitled cause, without admitting any of the allegations contained in the said complaint while reserving to itself the right hereafter to deny both generally and specifically any and all of said allegations, respectfully alleges that this Honorable Commission has no jurisdiction to take any action in this case in respect to the establishment, through routing and ticketing as prayed by the complainant herein.

In proof of lack of jurisdiction of this Honorable Commission to make any order upon this complaint under the circumstances of this case, The New York, New Haven & Hartford Railroad Company would refer to various schedules filed with this Honorable Commission showing that it is now and for a long time has been furnishing through transportation for passengers and their baggage by the system of transportation controlled by it between all the termini between which this complainant asks for the establishment of through arrangements. Some of these routes are shorter than the routes sought to be established by this complainant, and none of them are unreasonably long as compared with that for which the petitioner prays. In the case of certain of these routes between the termini in question respondent itself performs all of the transportation over its own railroad lines, and in the case of others part of the transportation is performed by water lines operated by corporations which it controls.

Therefore to order the establishment of through routes embracing the lines of the complainant between the points prayed would be to require in the face of the explicit limitation upon the jurisdiction of this Honorable Commission the respondent without its consent to take less than the entire transportation which it is now performing between the termini named by the aforesaid routes. Whatever hardship if any, the complainant may feel it is suffering by not being able to take away from the respondent the business which it is doing by diverting that business to the lines of the complainant constitutes no inquiry cognizable by the law.

Wherefore The New York, New Haven & Hartford Railroad Company respectfully asks that the above entitled complaint be dismissed for want of jurisdiction in this Honorable Commission to compel this respondent under the circumstances set forth to do any of the things for which this complainant prays.

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Without waiving any of its rights under the above answer or without prejudice to its rights to urge other grounds of lack of jurisdiction at other times, The New York, New Haven & Hartford Railroad Company, the respondent herein, for answer in this proceeding respectfully states:

1. That as to Paragraph I said respondent has no information, and therefore leaves proof of the same to the complainant.

2. That Paragraph II is admitted, but for further answer the respondent says that not only is it a common carrier engaged in the transportation of passengers and property between the city of Providence therein mentioned and the various cities and towns in the New England states by the railroads owned and operated by it but that between all the said cities and towns in the New England states and the city of New York it is engaged in the transportation of passengers and property by continuous carriage wholly by the railroad lines owned and operated by it.

3. That Paragraph III is admitted, but for further answer the respondent says that the New England Steamship Company is controlled by The New York, New Haven & Hartford Railroad Company and that the said New England Steamship Company is operated in conjunction with The New York, New Haven & Hartford Railroad Company.

4. That Paragraph IV is admitted subject to the further answer that during all times when the New England Steamship Company maintains service between the said city of Providence and the said city of New York The New York, New Haven & Hartford Railroad Company discharges for and receives from the New England Steamship Company at a wharf used by the said companies where the rail lines of the railroad company and the water lines of the steamship company connect passengers and property pursuant to routes established between the railroad company and the steamship company between all points as to which the petitioner asks for the making of additional through routes.

5. That Paragraph V is admitted subject to the further answer that the respondent by various routes by its own railroad lines exclusively as well as by various routes established by agreement between the respondent company and the steamship companies controlled by it is furnishing through service or participating in through routes between the termini in question which when not actually shorter are reasonably short as compared with the through route which the complainant asks to have established.

6. That Paragraph VI is denied, the respondent maintaining that neither by any matters alleged in this complaint nor by any act of this respondent otherwise has this complainant been subjected to unjust discrimination of any sort in violation of sections 1, 2, or 3 of the Act to regulate commerce approved February 4th, 1887 and the Acts amendatory thereof and supplemental thereto, and in particular this respondent denies that this complainant can claim whatever rights if any, a connecting carrier may have to complain of discriminatory treatment since this complainant cannot be regarded fairly as a connecting carrier as it does not by its water lines approach within a mile of that point where this respondent forwards and receives passengers and goods not by virtue of the ordinary obligations existing between connecting carriers but in conjunction with a water line controlled by it.

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7. That as to Paragraph VII the respondent has no information, and therefore leaves proof of the same to the complainant.

8. And the respondent further in answering says that by section 15 of the Act to regulate commerce, approved Feb. 4th, 1887 and the acts amendatory thereof and supplemental thereto no company should be required without its consent to enter into any through route which would compel it to embrace in such route substantially less than the entire length of its transportation lines lying between the termini of such proposed through route, and that if required to enter into the through route asked by the complainant this respondent or companies controlled by it, would be compelled to give up to this complainant the transportation for 180 miles or thereabouts which is now being rendered in the case of certain single line routes exclusively by the railroads operated by it and in other cases by long established through routes by the water lines of steamboat companies controlled by this respondent and operated in connection therewith.

9. And the respondent further submits to the Commission that as the respondent is furnishing between all the termini in question by its railroad lines and by the water lines controlled by it an excellent and diversified service by all practicable routes and at all convenient times at reasonable and appropriate rates, the Commission should not order the establishment of the route as asked for by the complaint, the addition to the existing services of the service which the complainant desires to furnish not being in the public interest. The respondent would further raise the question before the Commission whether it should be compelled to allow the complainant to collect large sums of money by the sale of tickets calling for transportation over its route without the financial responsibility of the complainant being established to the satisfaction of the Commission.

10. And the respondent further says that this system of services which it has established between the termini in question is in all respects adequate to handle all of the business moving between these points and that the rates therefore are reasonable for the service rendered in every instance. By reason of the fact that all of the capital stock of the steamship companies with which the through arrangements are made is so held as to be virtually owned by the respondent it is immaterial to the revenues of the system of the respondent whether the business moves by its own railroad lines or by the water lines thus controlled by it. Whereas if compelled to divide its revenues with the complainant the loss of revenue of the system of the respondent might prevent it from giving the present high grade of service it now renders between those termini at the present low standard of rates.

WHEREOF said respondent prays that the complaint in this proceeding may be dismissed:

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY.

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NO. 9. BILL TO ENFORCE ORDER OF THE COMMISSION

BILL OF COMPLAINT

INTERSTATE COMMERCE COMMISSION	}	<i>In the Circuit Court of the United States.</i> <i>In Equity.</i>
against		
ILLINOIS CENTRAL RAILROAD COMPANY, <i>et al.</i>		

To the Circuit Court of the United States sitting in equity, etc. (hereafter these bills will be brought in the Commerce Court sitting).

Your petitioner the Interstate Commerce Commission, which was created and established and now exists under and by virtue of an act of the Congress of the United States, entitled an Act to Regulate Commerce, approved February 4, 1887, as amended, etc. (here follows dates of amendatory acts), humbly complaining sheweth:

(I.) That the Illinois Central Railroad Company is, etc. (here follow the names of the various railroad corporations made defendants with the usual descriptions).

(II.) That the defendants above named were on the 24th day of July, 1903, and ever since have been and still are common carriers engaged in the transportation of persons and property by railroad under joint through rates and as members of continuous through lines between points in different states of the United States, and particularly in the transportation of lumber from lumber-shipping points on their respective lines (etc.), to "Ohio River points" (etc.), and to points north of the Ohio River and on and east of the Mississippi River, and as such common carriers and in respect to such transportation were and are subject to the provisions of the said act to regulate commerce and the amendments thereto.

(III.) That on the said 24th day of July, 1903, the Central Yellow Pine Association, composed of persons, firms and corporations engaged in the business of handling yellow pine lumber in the States of (etc.), filed, under section 13 of said Act to Regulate Commerce, a petition or complaint alleging violations on the part of the defendants of certain provisions of said act, as at large and more fully appears in and by the said complaint or petition on file in the office of the complainant herein, a copy whereof is hereunto annexed and made a part of this bill of complaint as Exhibit A; and that a copy of said Exhibit A, attested by the secretary of the complainant under the seal of the complainant was duly forwarded by the complainant to each of said defendants, as required by section 13 of said act.

(IV.) That on August 15, 1903, the defendants filed answers to said complaint, Exhibit A hereto, as at large and more fully appears in and by said answers on file in the office of the complainant herein, copies of which are hereto annexed and made parts of this petition as Exhibits from B to F, both inclusive.

(V.) That thereafterwards the said cause being at issue upon the pleadings aforesaid, duly came on for investigation and hearing before the complainant herein, the said Interstate Commerce Commission at (etc.) on (etc.) at which times and places the parties complainant and defendant appeared by their

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attorneys, or had due notice to appear, and testimony was taken on behalf of said parties.

(VI.) That on February 7, 1905, the complainant herein duly determined the matter in controversy between the said parties before it and made a report in writing in respect thereof setting forth its findings of fact and its conclusions based on said findings, namely, that an advance made April 15, 1903, by all the defendants from, etc. (the shipping points named), to, etc. (the Ohio River points named) of 2 cents in the rate on lumber in car loads was not warranted and that the resultant increased rates were unreasonable and unjust, in violation of the Act to Regulate Commerce, as at large and more fully appears in and by the said report of the complainant, a copy whereof is hereunto annexed and made part of this petition or bill of complaint as Exhibit G.

(VII.) That forthwith upon the determination of said cause as aforesaid on, to wit: said 7th day of February, 1905, the complainant duly formulated an order and notice in the premises based upon its findings and conclusions, requiring the defendants to cease and desist on or before April 1, 1905, from further maintaining or enforcing the said unlawful advance of 2 cents per 100 pounds, or the said unlawful rates resulting therefrom as aforesaid, which said order now remains in full force and effect, and a copy whereof is hereunto annexed and made part of this bill of complaint as Exhibit H, etc.

(VIII.) That the complainant agreeably to the provisions of the law in this regard duly caused a properly authenticated copy of its said report, Exhibit G hereunto, together with its said order Exhibit H hereunto, to be delivered to said defendants herein, and complainant shows that the said defendants, unmindful of their duty in that regard, have, through their officers, servants and attorneys, wholly disregarded and set at naught said order of the complainant, Exhibit H hereto, and have willfully and knowingly violated and disobeyed the same, and still do neglect and refuse to comply with the same or any part thereof.

(IX.) And the complainant charges that the said advance of 2 cents in the said lumber rates was and is unwarranted and has resulted in rates excessive, unreasonable and unjust in violation of the act to regulate commerce.

(X.) Wherefore the complainant prays:

1. That a subpoena or other suitable process may issue according to the course of equity (etc.).
2. That an order be made by this honorable court directing the method of service of notice (etc.).
3. That proper orders may be passed pending the cause as will secure a speedy hearing (etc.).
4. That proper orders to facilitate inquiries be made (etc.).
5. That upon the final hearing hereof a decree may be entered granting to complainant a writ of injunction or other proper process, mandatory or otherwise, to restrain the said defendants, and each of them, and their respective officers, servants and agents, from further continuing in their violation of and disobedience to the said order of the Commission.
6. That a decree may be entered fixing a sum not exceeding \$500 per day, for every day of disobedience to the injunction (etc.).

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7. That a decree may be entered requiring the said defendants to pay the costs of this proceeding and reasonable counsel fees.

8. For such other and further relief in the premises as to the court may seem meet and just and the equities of the case may require.

THE INTERSTATE COMMERCE COMMISSION

by Edw. A. Moseley,

The Secretary thereof, thereto duly authorized.

No. 10. BILL TO ENJOIN ORDER OF THE COMMISSION

BILL OF COMPLAINT

THE CHICAGO & ALTON RAILROAD COMPANY, Complainant, against THE INTERSTATE COMMERCE COMMISSION, Defendant.	}	<i>In Equity.</i>
---	---	-------------------

To the Honorable the Judges of the Circuit Court of the United States within and for the Northern District of Illinois:

The Chicago & Alton Railroad Company, a corporation organized and existing under and by virtue of the laws of the State of Illinois, brings this its bill against the Interstate Commerce Commission, established and existing under and by virtue of an act of the Congress of the United States, and thereupon your orator complains and says:

That the Chicago & Alton Railroad Company is a corporation duly organized under the laws of the State of Illinois; that the defendant, the Interstate Commerce Commission, had been created and exists, and during all the time herein mentioned, has existed, under and by virtue of an act of the Congress of the United States, entitled, "An Act to Regulate Commerce," approved February 4, 1887, and the acts amendatory thereof.

Your orator further avers that it has its principal operating office in the city of Chicago, Northern District of Illinois, Eastern Division.

Your orator further avers that the Chicago & Alton Railroad Company, is a common carrier, engaged in the transportation of property by railroad from and to points in various States and Territories of these United States to and from points within the States of Illinois and Missouri; that your orator is engaged and has been so engaged since the 29th day of April, 1908, in the transportation of commercial coal from the points within the States of Illinois and Missouri to points to the same States and beyond; that numerous coal mines are located on and along your orator's line, within the States of Illinois and Missouri, and principally within the State of Illinois; that these mines ship large quantities of commercial coal by your orator's line to consignees at different points upon the lines of other common carriers; that your orator for the accommodation of this commercial coal traffic, owns and operates 3,037 gondola coal cars; that when requested by the consignor or consignee, it furnishes in addition box cars for the transportation of coal; that its said 3,037 gondola cars and such box car equipment as may be desired by the shippers are sufficient at all ordinary times to transport all commercial coal tendered

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to your orator for shipment from the mines to consignees at various points upon your orator's line and beyond.

Your orator further avers (here it is stated that the railroad has 360 special fuel cars of its own which it utilizes exclusively to get its necessary fuel from the mines on its line).

Your orator further avers (here it is stated that the coal thus taken in fuel cars is not put into the course of commerce at all).

Your orator further avers (that at certain periods of the year, to wit, in the early winter months, there is a shortage of equipment for hauling commercial shipments of coal from mines along your orator's railroad; that at times of such car shortage your orator furnishes various mines along its line with commercial equipment pro rata in accordance with a certain circular bearing date October 17, 1906, effective November 1, 1906, and now in full force upon your orator's line, said circular being in words and figures as follows—here the rules governing the distribution of cars to coal mines contained in said circular are set forth in full, providing among other things that fuel cars will not be computed in assigning the quota of system cars).

Your orator further avers (that on, to wit, the 27th day of April, 1908, the Interstate Commerce Commission entered an order requiring your orator to cease and exist on or before the first day of July, 1908, and during a period of at least two years thereafter from maintaining and enforcing the present practice of coal car distribution along its line of railroad, said order being in words and figures as follows:—to wit,—here follows the order of the Interstate Commerce Commission directing that fuel cars shall be taken into consideration in making the allotment).

Your orator further avers (that a copy of said order was duly served upon a principal officer of your orator at his usual place of business).

Your orator further avers (that the said order of the said defendant the Interstate Commerce Commission was made upon a complaint filed with said body by the Illinois Collieries Company; that subsequent to the filing of said complaint, an answer was filed by your orator and testimony adduced by the said parties).

Your orator further avers (that, in requiring your orator to take into consideration its own fuel cars in determining the distribution of coal cars among the various mines along its line and to count as a part of the proportion of the mine, such cars as are consigned for your orator's own fuel, is unreasonable, unjust, oppressive and unlawful in that, etc.).

Your orator further avers (here it is claimed that the practice of car distribution is not subject to regulation by the Interstate Commerce Commission).

Your orator further avers (here it is claimed that the practice sought to be established by the Interstate Commerce Commission is not within its jurisdiction).

Your orator further avers (here it is claimed that there is no unreasonable discrimination by the non-counting of the orator's fuel cars).

Your orator further avers (here it is claimed that the fuel cars are not part of its commercial equipment).

Your orator further avers (here it is claimed that the order of the Interstate

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Commerce Commission is an unreasonable discrimination against mine supplying it with coal).

Your orator further avers (that the order limits the amount of coal to be mined, a matter outside the jurisdiction of the Commission).

Your orator further avers (here it is pointed out that the orator's own fuel supply does not enter into commerce).

Your orator further avers (that if the said order of the said defendant, the Interstate Commerce Commission, is allowed to become effective a multiplicity of suits against it will be caused).

Your orator further avers (that the acts of the Interstate Commerce Commission in which it intends to persist are contrary to equity and tend to the manifest injury of the orator).

Your orator therefore prays that upon the filing of this bill a temporary or interlocutory order may be entered herein suspending the said order of the said Interstate Commerce Commission, and restraining the said Commission from taking any steps or instituting any proceedings to enforce said order, and that upon a final hearing of this cause a decree may be entered herein enjoining, setting aside, annulling or suspending, the said order of the said Interstate Commerce Commission, and perpetually enjoining the enforcement of said order, and perpetually enjoining to the said defendants and its members or their agents, servants, and representatives from the enforcing of the said order, and from taking any steps or taking any proceedings towards the enforcement of the said order. Your orator further prays that such other and further relief may be granted in the premises as justice and equity may require.

Your orator prays that your honors may grant under your orator the writ of subpoena of the United States of America directed to the said Interstate Commerce Commission, commanding it on a certain day and under a certain penalty herein to be specified, personally to be and appear before your honors in this honorable court, and then and there full, true and complete answer to make to all and singular the premises, but not under oath, the answer under oath, hereby being expressly waived, and to stand to and abide by such order or decree herein as to your honors shall seem meet, and agreeable to equity and good conscience.

And your orator will ever pray, etc.

THE CHICAGO & ALTON RAILROAD COMPANY,
By ———, *its Solicitors.*

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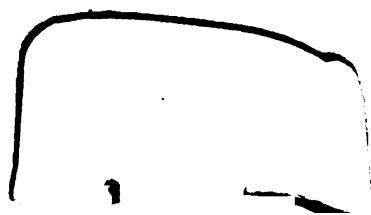
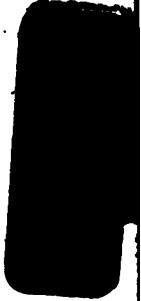
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